Arbitration: Hot Questions, Cool Answers

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INTRODUCTION

Arbitration is on the rise in the United States and throughout the world.

Domestically, arbitration has been boosted by the Roberts Court's enforcement of arbitration agreements under the Federal Arbitration Act (FAA) and the endorsement of not only the supremacy of the FAA over state common law[1] but the limited grounds upon which review of arbitration awards is permitted.[2]

Internationally, the golden age of arbitration, which began with the adoption in 1958 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards--or, as it is usually known, the New York Convention--is continuing to shine. Commerce today is more global than it has ever been multiplying the number of transactions that can give rise to disputes.

Private resolution of disputes, however, is not without critics. Arbitrants, like litigants, remain concerned about the honesty, ability and time-availability of arbitrators; integrity of document production; professionalism and civility; cost; and a myriad of other criticisms. In this paper, I address some of the burning questions in arbitration and offer insights on how they might be answered.

DOES IT MAKE SENSE TO CONSIDER USING ONE ARBITRATOR WHERE AN ADMINISTERING AUTHORITY ALLOWS FOR APPELLATE REVIEW BY A THREE-PERSON APPELLATE PANEL?

Many potential users eschew arbitration because of the absence of an appeal. The answer? Appellate arbitration. It is not new but, relatively speaking, it is in its infancy. On November 1, 2014, the American Arbitration Association/International Center for Dispute Resolution (AAA/ICDR) introduced appellate arbitration rules. JAMS and the International Institute for Conflict Prevention & Resolution (CPR) have had

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[1] *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (rejecting the California Supreme Court's determination that a consumer contract arbitration clause was unenforceable because of unconscionability under California common law because the Federal Arbitration Act preempts state law that is inconsistent with "the accomplishment and execution of the full purposes and objectives of Congress.").

[2] *Hall Street Associates, LLC v. Mattel, Inc.* 552 U.S. 576 (2008) (parties to an arbitration agreement may not expand the Federal Arbitration Act's grounds for vacatur and modification of an arbitration award). Those grounds appear in Sections 10 and 11 of the FAA and are quoted below.

an appellate arbitration option for several years. I examine below these three sets of appellate arbitration rules.

AAA Appellate Arbitration Rules

Referred to as "AAA/ICDR Optional Appellate Arbitration Rules,"[3] parties can stipulate or agree to use these appellate arbitration rules to obtain review of an arbitration award.[4] If they do so, and a "Notice of Appeal" is filed under Rule A-3 of the AAA/ICDR appellate rules, the "Underlying Award" is not considered final and therefore cannot be enforced in court until the appeal is resolved. Rule A-2(a) states:

> *Upon the filing of a Notice of Appeal pursuant to Rule A-3 of these Rules, the parties agree that the Underlying Award shall not be considered final for purposes of any court actions to modify, enforce, correct, or vacate the Underlying Award ("judicial enforcement proceedings"), and the time period for commencement of judicial enforcement proceedings shall be tolled during the pendency of the appeal. The parties agree to stay any already initiated judicial enforcement proceedings until the conclusion of the appeal process. If the appeal is withdrawn, the Underlying Award shall be deemed final as of the date of withdrawal.*[5]

The filing requirements for the appeal appear in Rule A-3. They are straightforward. Within 30 days from the date the Underlying Award is submitted to the parties (not the date of the award itself if it is earlier), any party may initiate an appeal by filing with the AAA the following:

- Notice of Appeal,[6]
- Administrative filing fee as set forth in the Fee Schedule,[7]
- Copy of the applicable arbitration agreement providing for appeal of the Underlying Award, and

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[3] https://www.adr.org/aaa/faces/rules/searchrules/rulesdetail?doc=ADRSTAGE2016217&_afrLoop=561555376178854&_afrWindowMode=0&_afrWindowId=gjc03r662_121#%40%3F_afrWindowId%3Dgjc03r662_121%26_afrLoop%3D561555376178854%26doc%3DADRSTAGE2016217%26_afrWindowMode%3D0%26_adf.ctrl-state%3Dgjc03r662_181.

[4] There is a footnote in Rule A-1 that precludes application of the appellate arbitration rules to consumer contracts with arbitration clauses: "These Appellate Rules do not apply to disputes where the arbitration clause is contained in an agreement between individual consumers and businesses where the business has a standardized, systematic application of arbitration clauses with customers and where the terms and conditions of the purchase of standardized, consumable goods or services are non-negotiable or primarily non-negotiable in most or all of its terms, conditions, features, or choices." This limitation is not stated in the JAMS or CPR appellate rules discussed below.

[5] Section 9 of the FAA provides that a party "may apply" for judicial confirmation at any time within one year after "the award is made." While there is conflicting case law on whether this one-year period is mandatory, the time period can be tolled. *Photopaint Technologies, LLC v. Smartlens Corp.*, 335 F.3d 152 (2nd Cir. 2003) (disagreeing with Fourth and Eighth Circuit rulings that called the one-year period permissive because of the use of "may" apply, but then allowing the post-one year petition to confirm since it had been tolled by a letter agreement of the parties). By agreeing to the AAA Appellate Arbitration Rules, the parties will have agreed to tolling as well.

[6] AAA/ICDR Appellate Rule A-3 provides that the Notice of Appeal "shall include: a. The name of each party; b. The address for each party, including, if known, telephone and fax numbers and email address; c. If applicable, the names, addresses, telephone and fax numbers and, if known, email address of the known representative for each party; d. A statement setting forth the portion or portions of the Underlying Award being appealed and the errors alleged; e. The qualifications, expertise and number of appellate arbitrators requested; and f. The filing fee."

[7] At the end of the AAA's appellate rules there is an "Administrative Fee Schedule" that provides that there is a "non-refundable $6,000 administrative fee to be paid by the party seeking an appellate arbitration" and an "additional $6,000 administrative fee" has to be paid by any party filing a cross-appeal. These fees "do not include the fees and costs of the Appeal Tribunal."

- Copy of the Underlying Award.

The party filing the Notice of Appeal is called the "Appellant." The Appellant is required to provide the Notice of Appeal and applicable arbitration agreement to every other party to the Underlying Award at the time the Appellant makes the AAA filing. The date on which the filing requirements are satisfied establishes the date of filing for AAA's administrative purposes. AAA Rule A-3(b).[8] If there is any dispute about the date of filing, the dispute is resolved by the appeal tribunal. *Id.*

Cross-appeals are also allowed. Rule A-3(c) provides:

> *(c) Cross-Appeal. Each Appellee may file a cross-appeal with the AAA within seven (7) days after notice of filing of a Notice of Appeal. The Appellee shall, at the time of any such filing, send a copy of the cross-appeal to the Appellant and all other parties to the Underlying Award. The cross-appeal shall include a statement setting forth the portion or portions of the Underlying Award being appealed and the errors alleged, and the qualifications, expertise and number of appellate arbitrators requested. The administrative filing fee as set forth in the Fee Schedule must be paid at the time of the filing of any cross-appeal.*[9]

Who sits on the appeal tribunal? Rule A-4(a) provides the answer: "The appeal tribunal shall be selected from the AAA's Appellate Panel, or, if an international dispute, from its International Appellate Panel."[10]

The parties are allowed to appoint the appeal panel or to agree on a method of appointment. If they have not done so, Rules A-5(a) and (b) establish a list system for the appointment. It works like this:

1. Upon receipt of a Notice of Appeal, the AAA sends each party "an identical list of ten (10) (unless the AAA decides that a different number is appropriate) names of persons chosen from the AAA's Appellate Panel."
2. "The parties are encouraged to agree to the appeal tribunal from the submitted list and to advise the AAA of their agreement."
3. If the parties do not agree, each party has 14 days from the transmittal date "to strike names objected to, number the remaining names in order of preference, and return the list to the AAA."
4. "If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable."

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[8] Rule A-3 (b) also provides that if the filing does not satisfy the filing requirements, "the AAA shall acknowledge to all named parties receipt of the incomplete filing and inform the parties of the filing deficiencies. If the deficiencies are not cured by the due date specified by the AAA, the filing may be returned to the filing party."

[9] As is the case with the appeal, if the cross-appeal filing "is deficient, and not cured by the date specified by the AAA, it may be returned to the filing party." AAA/ICDR Appellate Rule A-3(c).

[10] To address potential conflicts or availability of an appellate arbitrator, AAA/ICDR Appellate Rule A-4(b) provides: "No person shall serve as an appellate arbitrator in any dispute in which that person is precluded from serving under the applicable code of ethics governing the appointment of arbitrators. Prior to accepting an appointment, the prospective appellate arbitrator(s) shall disclose to the AAA any circumstances likely to create a presumption of bias or prevent a prompt resolution of the appeal. Upon receipt of such information, the AAA shall either replace the appellate arbitrator(s) or immediately communicate the information to the parties for their comments. In the event that the parties disagree as to whether the appellate arbitrator shall serve, the AAA has the authority to make the decision as to whether the appellate arbitrator(s) shall serve or whether another appellate arbitrator(s) shall be appointed by the AAA. The AAA is authorized to appoint another appellate arbitrator(s) if the appointed appellate arbitrator(s) is unable to serve promptly."

5. The AAA then invites the persons approved on both lists in accordance with the designated order of mutual preference to serve on the panel.
6. "If the parties fail to agree on the appeal tribunal from the persons named, or if acceptable arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted lists," the AAA can make the appointment from among other members of the AAA's Appellate Panel without the submission of additional lists.

The panel will consist of three appellate arbitrators "unless the parties agree to utilize a single arbitrator." AAA/ICDR Appellate Rule A-5(c). The AAA appoints the Chairperson of the panel. *Id.*[11]

Then taking into account fairness, cost-effectiveness, and expedition, the appeal tribunal is directed to organize the appeal process by holding a conference call within one week of its appointment. Rule A-7(a) provides:

> *Within one week of the appointment of the appeal tribunal a preliminary conference call will be scheduled with the parties, the appeal tribunal and the Case Manager to review and formalize the briefing schedule, set a deadline for the submission of the record on appeal and address any other procedural issues consistent with these rules and the objectives for an expedited, cost effective and just appellate process.*

The tribunal is directed to embody the results of this call in an order. AAA/ICDR Appellate Rule A-7(b). The appeal tribunal is also given leeway to require a "detailed specification of issues on appeal" before the Appellant's first brief and to direct or limit the Appellant or Appellee "to certain areas or issues in their briefing." The tribunal can also request additional briefing. AAA/ICDR Appellate Rule A-7(c).

A party may decide it will not participate in the appeal. If that happens, Rule A-8 allows the appeals tribunal to continue with the appeal process if the tribunal determines (1) the "absent party consented to the jurisdiction of the appeal process by agreement," (2) "due notice" was provided, and (3) "the absent party is provided a copy of the order from the preliminary conference call."

It would not seem likely that there would be a jurisdictional challenge to the appeals tribunal's jurisdiction but history is filled with ambiguous arbitration clauses. Should there be such a challenge, Rule A-9 gives the appeal tribunal the power to rule on the challenge, "including any objections with respect to the existence, scope or validity of the arbitration agreement." If the tribunal determines that it does not have jurisdiction, the appeal is dismissed and "the Underlying Award shall be deemed to be final."

Rule A-16 is entitled "Record on Appeal" although it covers more topics than just the record. First it provides that the parties "shall cooperate in compiling the record on appeal." Specifically, they may submit:

- relevant excerpts of the transcript of the arbitration hearing giving rise to the Underlying Award, if any,
- expert reports,
- deposition transcripts or affidavits that were admitted as part of the arbitration hearing,
- documentary evidence admitted into evidence during the arbitration hearing,
- Appellant and Appellee pre- and post-hearing briefs, or

[11] Rule A-5(d) allows the parties to request an appellate arbitrator with "specific qualifications." If such a request is made, "the AAA will consider such requests when creating the list of the appellate arbitrators. Such requests shall be made by the Appellant in its Notice of Appeal, and by the Appellee within three (3) days of receipt of the Notice of Appeal."

- other evidence relevant to the appeal that was presented at the arbitration hearing.

AAA/ICDR Appellate Rule 16. A party may not present for the first time on the appeal "an issue or evidence that was not raised during the arbitration hearing." If there is any dispute over whether a document is part of the record, the appeal tribunal hears the dispute. *Id.* The tribunal also establishes the deadline by which the record is due. *Id.*[12]

Pursuant to Rule A-10, there are two grounds for appeal of the Underlying Award: "(1) an error of law that is material and prejudicial; or (2) determinations of fact that are clearly erroneous." Why the word "material" was not used to modify "fact" is curious but the appeals tribunal should be able to overcome this omission by its inquiries during the preliminary conference call. And while these two bases for an appeal appear stringent, they provide much more opportunity to obtain review of an award than exists under the FAA,[13] and they are not that dissimilar from standards[14] of review by appellate courts.

The trade off, however, is that the parties have no other opportunity to challenge an award. Rule A-22(c) explains that judgment can be entered by a court based on the appellate arbitration award: "Parties to an arbitration under these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof."

Parties who agree to take appeals under the AAA/ICDR Appellate Rules, must be prepared to draft their briefs quickly. The initial brief must be served within 21 days after service of the notice of appeal. The answer brief is due 21 days after service of the initial brief. The reply brief is due within ten days after service of the answer brief. AAA/ICDR Appellate Rule A-17(a)-(f).

The tribunal is instructed to be rigorous in controlling the time required for briefing:

> *(g) For good cause shown, each party is entitled to request a single seven (7)-day extension for filing a brief that is to be served under these rules, such extension to be granted by the Case Manager. In extraordinary circumstances, subject to the discretion of the appeal tribunal, an additional extension may be granted.*

AAA/ICDR Appellate Rule A.17(g).

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[12] Rule A-16 says the deadline is set at the preliminary conference.

[13] Section 10 of the FAA limits the grounds on which an arbitration award can be vacated to (1) corruption, fraud, or undue means in the procurement of the award; (2) bias or corruption in the arbitrators; (3) misconduct by the arbitrators in refusing to postpone the arbitration hearing "upon sufficient case shown," or refusing to hear evidence "pertinent and material to the controversy," or "of any other misbehavior by which the rights of any party have been prejudiced"; or (4) exceedance by the arbitrators of their powers or where the arbitrators "so imperfectly executed" their powers that a "mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(1)-(4). Section 11 provides: "In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award. (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted. (c) Where the award is imperfect in matter of form not affecting the merits of the controversy. The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties." 9 U.S.C. § 11(a)-(c).

[14] Section 12 of the FAA provides that notice of a "motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered." But AAA Rule A-2 states that the award is not final if a notice of appeal is filed with the FAA (and therefore would not be "filed or delivered"). In any event, under Rule A-22(c), there would not be a right vacate, modify, or correct the appellate award since parties have agreed that they "shall be deemed to have consented" to entry of a judgment by a federal or state court with jurisdiction.

The appeal is conducted "at the same place as the underlying arbitration." AAA/ICDR Appellate Rule A-14. Oral argument is not guaranteed. It occurs if the appeals tribunal decides it is "necessary":

> *(a) Unless otherwise directed by the appeal tribunal, all appeals will be determined upon the written documents submitted by the parties. If the appeal tribunal deems oral argument necessary, or a party requests oral argument, the appeal tribunal at its discretion may schedule same.*
>
> *(b) Requests for oral argument must be made within thirty (30) days of service of the Notice of Appeal or it is waived. If oral argument is granted it shall be scheduled to take place within thirty (30) days of filing of the last brief.*

AAA/ICDR Appellate Rule A-15.

The tribunal's decision is due within 30 days after service of the last brief, or if oral argument takes place, within 30 days after the date of oral argument. AAA/ICDR Appellate Rule A-19(a) and (b).[15] The decision must be in writing and "shall include a concise summary of the decision and an explanation for the decision, unless the parties agree otherwise." AAA/ICDR Appellate Rule A-19(c). If the tribunal consists of more than one arbitrator, a majority of the tribunal must decide the award, unless a different number is "required by law or by the arbitration agreement." AAA/ICDR Appellate Rule 19(d).[16]

In its decision, the appeal tribunal does not have the option to order a new hearing or to return the matter to the arbitrator(s) for either correction or review. AAA/ICDR Appellate Rule A-19. Instead, the tribunal may take any one of the follow actions by this date:

> *1. adopt the Underlying Award as its own, or,*
>
> *2. substitute its own award for the Underlying Award (incorporating those aspects of the Underlying Award that are not vacated or modified), or,*
>
> *3. request additional information and notify the parties of the tribunal's exercise of an option to extend the time to render a decision, not to exceed thirty (30) days.*

AAA/CDR Appellate Rule A-19(a).

Should the appellant or a cross-appellant lose the appeal, it "may be" assessed the costs of the appeal as well as the "other reasonable costs" of the appellee or a cross-appellee, "including attorneys' fees." However, a

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[15] Rule A-19(b) allows for more time: "The initial thirty (30)-day time frame may be modified for good cause or if oral argument is to take place and it has not yet occurred. In the event the extension is because of oral argument, the initial thirty (30) days for rendering a decision will commence the day following the conclusion of the oral argument."

[16] I have not conducted research to determine if there is a law that requires other than a majority. The AAA's appellate rules do not explain what happens if the arbitration agreement for some inexplicable reason requires unanimity in the decision and the appeals tribunal reaches an impasse in trying to achieve it. Presumably the AAA's appellate rules would trump such a term, or the underlying award would become final. Note that the AAA Appellate Rules do not state that they can be modified by the parties.

parenthetical clause limits an award of attorneys' fees to a situation where a statute or a contract between the parties permits such an award. AAA/ICDR Appellate Rule A-11.[17]

Once the tribunal's decision is served, the appeal process is concluded and the appellate ruling becomes the final award for purposes of judicial enforcement. AAA/ICDR Appellate Rule 20.

Rule A-21 addresses confidentiality and, as might be expected, it provides that the parties and the appeal tribunal "shall maintain the confidentiality of these proceedings except in the case of a judicial challenge or court order concerning the proceeding, or as otherwise required by law."[18]

JAMS Optional Appeal Procedures

JAMS has an arbitration appeal procedure as well.[19] JAMS Rule 34 is entitled "Optional Arbitration Appeal Procedures."[20] If all parties agree in writing to the appeal procedure, then the appeal panel will consist of three members unless the parties agree that there will be just one member. Once the appeal is filed, the Case Manager "will recommend to the Parties an Appeal Panel and will make any disclosures that are mandated by applicable law regarding the candidates for the Panel." The parties are then asked to agree on the Panel's members and if they do not agree, then the case manager appoints the Panel. JAMS Appeal Procedure (A).

The appeal is initiated by serving the appeal in writing to the case manager and the opposing party or parties within 14 calendar days after the Award has become final. JAMS Appellate Procedure (B)(i).[21] Within seven calendar days later, the opposing party or parties may serve a cross appeal. In either case, "The letter or other writing evidencing" the appeal or cross-appeal "must specify those elements of the Award that are being Appealed and must contain a brief statement of the basis for the" appeal or cross-appeal. JAMS Appeal Procedure (B)(i) and (ii).

Under JAMS Appeal Procedure (B)(iii), the record on appeal consists of "the stenographic or other record of the Arbitration Hearing and all exhibits, deposition transcripts and affidavits that had been accepted into the record of the Arbitration Hearing by the Arbitrator(s)."[22]

The parties may elect to rely on memoranda or briefs submitted to the arbitrator(s) who rendered the award. If they do not, the case manager will seek the agreement of the parties on a briefing schedule and if that

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[17] Rule A-11 reads in full: "The Appellant/Cross-Appellant may be assessed the appeal costs, and other reasonable costs of the Appellee/Cross-Appellee, including attorneys' fees (if a statute or the parties' contract provides for an award of attorneys' fees), incurred after the commencement of the appeal if the Appellant/Cross-Appellant is not determined to be the prevailing party by the appeal tribunal."

[18] As noted earlier, unlike the AAA's Commercial Arbitration Rules, the AAA Appellate Rules do not state that they can be modified.

[19] http://www.jamsadr.com/appeal/. The JAMS rule has been in place since 2003.

[20] http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_comprehensive_arbitration_rules-2010.pdf.

[21] JAMS Appeal Procedure (C) provides that the arbitration award is not final once an appeal has been timely filed.

[22] JAMS Appeal Procedure (B)(iii) adds: "The Parties will cooperate with the Case Manager in compiling the record on Appeal, and the Case Manager will provide the record to the Appeal Panel. No evidence not previously accepted by the Arbitrator(s) will be considered by the Appeal Panel, unless the basis of the Appeal is non-acceptance by the Arbitrator of certain evidence or unless the Appeal Panel determines that there is good cause to re-open the record pursuant to the applicable JAMS Arbitration Rules." The JAMS rules do not explain what circumstances would constitute good cause to permit the reopening of the record. One has to think this would be a very rare occurrence.

agreement cannot be secured, the case manager will establish the briefing schedule. JAMS Appeal Procedure (B)(iv).

Oral argument will be conducted if all parties request it, or if the Appeals Panel decides to hold oral argument. JAMS Appeal Procedure (B)(v). If oral argument is held, the case manager will work with the parties to establish the date and duration of oral argument and how much time will be allocated to each advocate. If the parties do not agree, the Appeals Panel will set the date, duration, and allocation of time. *Id.*

The standard of review under the JAMS Appeals Procedures is similar to the AAA's standard of review but not as explicit. JAMS instructs the Appeal Panel to apply the "same standard of review that the first-level appellate court in the jurisdiction would apply to an appeal from the trial court decision." JAMS Appeal Procedure (D).[23]

Under the JAMS appeal procedure, the appeal panel has several options. It can "affirm, reverse or modify an Award." *Id.* It may not "remand to the original Arbitrator(s)," but the appeal panel "may re-open the record in order to review evidence that had been improperly excluded by the Arbitrator(s) or evidence that is now necessary in light of the Panel's interpretation of the relevant substantive law." *Id.*

A three-member appeal panel must make its decision by majority vote. *Id.*[24] Absent good cause for an extension, the decision will be rendered "within twenty-one (21) calendar days of the date of either oral argument, the receipt of the new evidence or receipt of the record and of all briefs, whichever is applicable or later." *Id.* "The Panel's decision will consist of a concise written explanation, unless all Parties agree otherwise." *Id.* The JAMs appeal procedures do not discuss the award of costs or fees to the prevailing party.

Should a party that agreed to the Optional Appeal Procedure refuse to participate, the appeal panel may continue with the appeal. JAMS Appeal Procedure (E) provides:

> *If a Party refuses to participate in the Optional Appeal Procedure after having agreed to do so, the Appeal Panel will maintain jurisdiction over the Appeal and will consider the Appeal as if all Parties were participating, including retaining the authority to modify any Award or element of an Award that had previously been entered in favor of the non-participating Party, assuming it believes that the record, after application of the appropriate standard of Appeal, justifies such action.*

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[23] However, under JAMS Appeal Procedure D, the appeal panel must "respect the evidentiary standard set forth in Rule 22(d) of the JAMS Comprehensive Arbitration Rules." Rule 22(d) provides: "Strict conformity to the rules of evidence is not required, except that the Arbitrator shall apply applicable law relating to privileges and work product. The Arbitrator shall consider evidence that he or she finds relevant and material to the dispute, giving the evidence such weight as is appropriate. The Arbitrator may be guided in that determination by principles contained in the Federal Rules of Evidence or any other applicable rules of evidence. The Arbitrator may limit testimony to exclude evidence that would be immaterial or unduly repetitive, provided that all Parties are afforded the opportunity to present material and relevant evidence."

[24] There is no exception for what a statute may require and there is no option for the arbitration agreement to provide a different requirement.

Upon service of the Appeal Panel decision, the award becomes final for purposes of judicial review. JAMS Appeal Procedure F.[25]

CPR Appellate Rules

CPR also has appellate rules that go into effect if the parties have agreed in writing that an appeal can be taken.[26] CPR uses a list system for the appointment process.[27] The standard of review under the CPR rules is very similar to the AAA standard of review. The appeal tribunal under the CPR rules may modify or set aside the original arbitration award "only upon the following grounds":

> *a. That the Original Award (i) contains material and prejudicial errors of law of such a nature that it does not rest upon any appropriate legal basis, or (ii) is based upon factual findings clearly unsupported by the record; or*
>
> *b. That the Original Award is subject to one or more of the grounds set forth in Section 10 of the Federal Arbitration Act for vacating an award. The Tribunal does not have the power to remand the award.*

CPR Appellate Rule 8.2.

CPR Rule 1.1 provides that, "The parties to any binding arbitration conducted in the United States, pursuant to CPR Rules for Non-Administered Arbitration ('CPR Arbitration Rules') or otherwise, may agree in writing that a party may file an appeal (the 'Appeal') under the CPR Arbitration Appeal Procedure (the 'Appeal Procedure') from an arbitration award (the 'Original Award')." Unlike the JAMS and AAA appellate rules, if any party requests oral argument, it is granted. CPR Appellate Rule 7.4.

As with the JAMS and AAA appellate rules, the decision is made by majority vote if the tribunal consists of three members. CPR Appellate Rule 8.3. If a party refuses to participate in the appeal after having agreed to do so, the tribunal may still act. CPR Appellate Rule 8.5. The appellate award becomes final upon receipt of the award by the parties. CPR Appellate Rule 8.6. CPR Appellate Rule 9 provides that the parties and the tribunal shall use "best efforts" to assure that the appeal is concluded "within six months of its commencement."

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[25] JAMS Appeal Procedure (F) provides in full: "After the Appeal Panel has rendered a decision and provided the Parties have paid all JAMS fees in full, JAMS will issue the decision by serving copies on the Parties. Service will be deemed effective five (5) calendar days after deposit in the US Mail. Upon service of the Appeal Panel decision, the Award will be final for purposes of judicial review."

[26] http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/604/CPR-Arbitration-Appeal-Procedure-and-Commentary.aspx. The CPR appellate rules were first adopted in 1999.

[27] CPR Appellate Rule 4.2 provides: "After CPR has received the notice of appeal and any notice of cross appeal, it shall promptly submit to the parties a list of not less than seven candidates from the Panel (or not less than three candidates if one is to be chosen) who have been pre-screened for possible conflicts and availability. The list shall be accompanied by each candidate's biographic information and compensation rate. The parties shall attempt to agree on the required number of candidates from the list. They shall promptly inform CPR of any candidates on whom they have agreed. Failing complete agreement within ten days, the parties shall submit the list to CPR within an additional five days, rank ordering the candidates on whom they did not agree. Thereupon, the required number of candidates receiving the lowest combined score shall be chosen by CPR, which shall also break any tie. Any party failing without good cause to return a rank-ordered candidate list within the prescribed time shall be deemed to have assented to all candidates on the list."

There is also a confidentiality provision in the CPR appellate rules. Rule 13 provides: "The parties and the arbitrators shall treat the proceedings, including the Record, and the decision of the Tribunal as confidential, except in connection with a judicial challenge to, or enforcement of, the Original Award and the Appellate Award, and unless otherwise required by law." There are also provisions for payment of the tribunal's fees and costs.[28]

Under the CPR rules, attorneys' fees can also be awarded to the winning party. CPR Appellate Rule 12 provides:

> *In the event that the Tribunal fully affirms the Original Award, the appellant(s) shall promptly reimburse the appellee(s) (a) the share of the costs of the Appeal theretofore expended by the appellee(s), and (b) the appellee's attorney fees and other out-of-pocket expenses related to the Appeal, unless the Tribunal orders otherwise. If the Tribunal modifies or reverses the Original Award, the Tribunal may apportion the parties' costs of the Appeal, attorney fees and other out-of-pocket expenses among the parties in such manner as it deems reasonable, taking into account the circumstances and result of the Appeal.*

Takeaways on Appellate Arbitration

Parties to an arbitration agreement that would allow for use of the AAA, JAMS, or CPR appellate arbitration rules must seriously evaluate whether to adopt one of them. These are among the factors to weigh:

1. The FAA Section 10 standard of review is quite limited: there must be fraud, corruption, bias, a lack of due process, or arbitrators must have exceeded their powers. An arbitration award that contains erroneous factual or legal conclusions cannot be vacated without a Section 10 ground for vacatur. Appellate arbitration review is the only way an arbitrant can obtain review of legal or factual errors in an award.
2. There will be more time involved in obtaining a final arbitration award.[29]

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[28] CPR Appellate Rule 10 provides: "Each member of a Tribunal shall be compensated at an hourly rate determined at the time of appointment for all time spent in connection with the proceeding and shall be reimbursed for any travel and other expenses." CPR Appellate Rule 11 adds: "The Tribunal may require each party to deposit with the Chair an equal amount as an advance for the anticipated fees and expenses of its members. Any such funds shall be held and disbursed in such a manner as the Tribunal may deem appropriate. After the Appellate Award has been rendered, the Tribunal shall return any unexpended balance from deposits made to the parties. If the requested deposits are not paid in full within twenty days after receipt of the request, the Tribunal may so inform the parties in order that jointly or severally they may make the required payment. If such payment is not made, the Tribunal may suspend or terminate the proceedings."

[29] The preamble to the AAA Appellate Arbitration Rules suggests that the appeal process should take three months. There are 30 days to file the notice of appeal. If no tribunal has been agreed upon by then, AAA sends out a list of ten candidates and parties have 14 days to return them. Assuming that the list is not already compiled and sent out automatically and the tribunal is not determined on the 14th day, and assuming a party files on the thirtieth day, getting a tribunal in place will take 45-50 days. The preliminary conference call will presumably occur within the next seven days assuming that everyone's schedules can manage that time period. The record has to get compiled as well in parallel with this activity. Since the first brief is due 21 days after the notice of appeal is filed, and the tribunal will not likely be formed until just before the 21 days are up, it is likely that the tribunal's first act will be to extend the time for the first brief so that the tribunal can perform its Rule A-7 functions (consider requiring a detailed specification of issues on appeal in advance of the first brief and directing or limiting parties to certain areas or issues in briefing). In other words it seems likely in most circumstances that the first brief would not be filed until 30-60 days after the notice of filing the appeal. The answer and reply briefs would then be filed presumably within the next 30 days. If oral argument is allowed it must occur within 30 days of the last brief. The tribunal has 30 days to rule from the date of filing the last brief but this time can be extended, under AAA Rule A-19, if oral argument is allowed or for good cause. This analysis suggests that five to six months is a better estimate than three months. It seems unlikely that appeals under the JAMS rules would be resolved in much less time. CPR's appellate rules anticipate that the appeal process might take at least six months.

3. There will be more cost involved in obtaining a final arbitration award. However, prevailing parties likely will be awarded their costs. And if parties decide to use one arbitrator instead of three arbitrators for the arbitration, and then add an appellate arbitration component with one or even three arbitrators, the overall cost of the arbitration may actually be lower than having a three-person arbitration panel without an appellate arbitration option.
4. The CPR appellate rules allow for recovery of attorneys' fees by the prevailing party. The AAA rules allow them only if a statute or the parties' agreement provides for them. The JAMS appeal procedures are silent on an award of fees. Hence, if parties agree on the use of appellate arbitration procedures and want to reallocate attorneys' fees, they should provide for an award of reasonable attorneys' fees to the prevailing party.
5. The AAA rules provide that the losing party in an appellate arbitration award must consent to a judgment upon the award in any federal or state court with jurisdiction. So enforcement should be automatic under the AAA rules. There is not a similar provision in the JAMS or CPR appellate rules, although the CPR appellate rules allow the appeal tribunal to consider grounds for vacating an award under Section 10 of the Federal Arbitration Act. That would suggest that enforcement should be automatic if the CPR appellate tribunal rejects Section 10 arguments.
6. The complexity of the issues and the amount in controversy may be especially significant in evaluating the use of appellate arbitration. It would seem that the more complex the issues and the greater the amount in controversy, the more attention that parties should pay to the pros and cons of using appellate arbitration rules.
7. If interim measures are awarded in an arbitration, having an appellate panel that is authorized by agreement to hear an appeal of an award of interim measures might be, depending upon the jurisdiction, the most expeditious means of review of such an award.

WHAT COMMON MISTAKES DO PARTIES MAKE IN DRAFTING ARBITRATION CLAUSES FOR DOMESTIC OR INTERNATIONAL ARBITRATION?

Everyone has their own list of "do's" and "don'ts" in drafting arbitration clauses. What might be the best clause in one setting might not be the best clause in another setting. I discuss below some of the checklist items one should consider in drafting.[30]

***Ad Hoc* or Not?** Do you want the arbitration to be administered by an authority like the AAA, JAMS, CPR, the London Court of International Arbitration (LCIA), International Chamber of Commerce (ICC), ICDR, or any one of a number of other institutions that are in the business of administering domestic and international arbitrations? One reason to go *ad hoc* is to avoid the fees of the administering institution. The arbitrator or the panel will then have to manage the collection of funds for the arbitration directly. Rules like the UNCITRAL rules[31] can be used in international arbitrations that are *ad hoc* and they can work quite well. But where issues come up that an administering authority would normally handle, a court is the backstop in an *ad hoc* arbitration. The most obvious such issue is the appointment of the tribunal. There has to be a default

[30] The list is not intended to be all encompassing.

[31] These rules are published by the United Nations Commission on International Trade Law. They were amended in 2010 and can be found at: http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf.

mechanism and that would be a court or, in the case of the UNCITRAL Rules, the General Secretary of the Permanent Court of Arbitration in The Hague.[32]

If one decides to go with an administering authority, generally speaking, they all do a good job. There will be cost differences in the fees of the institution and case managers can be variable from institution to institution and even within institutions. The rules are not so different that they may dictate the choice of an institution but there are slight nuances, some of which are discussed in this paper, which may affect the choice of a particular arbitration institution to administer the arbitration.

Modifying Rules. It is not a well-known fact, but the rules of some institutions can be modified. Illustratively, Rule R-1 of the AAA Commercial Rules provides: "The parties, by written agreement, may vary the procedures set forth in these rules. After appointment of the arbitrator, such modifications may be made only with the consent of the arbitrator." This means that some rules can be excluded or varied if the parties agree up front.

Number of Arbitrators. Having three arbitrators on a matter can increase the cost of arbitration quickly and dramatically. Always ask the question: if a dispute arises under the agreement, is there a material benefit to having more than one arbitrator? One might tie the number of arbitrators to the amount in controversy or whether a final award might contain injunctive relief, including specific performance.

Arbitrator Selection. I discuss this topic elsewhere in this paper. The point here, however, is that parties need to at least think about the selection process to be sure that they are comfortable with the way the persons who will be resolving disputes are going to be identified.

Language of the Arbitration. In international arbitration clauses, be sure to specify the language to avoid disputes later.

Place of the Arbitration. Domestically and particularly, internationally, thought should be given to the place of arbitration. The law of the state where the arbitration will take place will control procedural issues that might arise during the course of the arbitration. The attitude of the judiciary to arbitration in the chosen jurisdiction is very important in the selection of an arbitration venue. Even if a place is designated, can the parties by agreement move the hearing location for convenience? Costs can vary dramatically based on the place of arbitration. Ease of travel, hearing room space, cost of hearing room space, hearing support services—all of these items are worth thinking about once a number of suitable venues have been identified based on the attitude towards arbitration of local law and local courts.

Governing Law of the Agreement. Too little attention is paid to this topic. Normally the knee-jerk reaction is to choose the law of this state or that state or this country or that country because "that's what we always do." That may be a good strategy much of the time, but it is also prudent to stop and ask, "Why are we choosing this state or country's law?" Is there an alternative that makes more sense for the type of dispute we

[32] UNCITRAL Arbitration Rules, Article 6(2).

are likely to have? Or have case law developments produced conflicting cases that might create jeopardy either in the application of the law by the arbitrators or the enforcement of the award later?[33]

Discovery or Disclosure. If arbitration rules are applicable, discovery or disclosure will be at the discretion of the tribunal. But that does not mean that in an arbitration agreement parties cannot establish ground rules on whether any document production will be allowed (as opposed to listing as exhibits documents that each party is relying upon and then exchanging those documents). An agreement might prohibit depositions or allow a limited number of them for a limited length of time. It might address issues associated with electronically stored information (e.g., no production from backup tapes). It might establish ground rules for preservation. There is no reason why these kinds of issues could not be considered at the time an arbitration clause is drafted if they might become material later in the conduct of an arbitration proceeding.

Provisions for Sanctions. As is discussed elsewhere in this paper, a tribunal's authority to sanction a party can be limited. Another checklist item is whether to add a provision establishing process terms for addressing sanctionable conduct. It may not be an appealing topic as part of a business negotiation where the arbitration

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[33] Consider the issue of the continuing vitality of "manifest disregard of the law" as a basis to vacate an award. In *Hall Street*, *supra*, petitioner argued that "manifest disregard of the law" was a separate ground available to a court in reviewing an arbitration award based on language from *Wilko v Swan*, 346 U.S. 427 (1953). The Supreme Court in *Hall Street*, however, said that this argument was "too much for *Wilko* to bear." 552 U.S. at 585. It added: "We, when speaking as a Court, have merely taken the *Wilko* language as we found it, without embellishment, *see First Options of Chicago, Inc. v. Kaplan*, 514 U. S. 938, 942 (1995), and now that its meaning is implicated, we see no reason to accord it the significance that Hall Street urges." *Id.* In *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 130 S. Ct. 1758 (2010), the Court elected not to decide the question: "We do not decide whether manifest disregard survives our decision in *Hall Street* . . ., as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. § 10." 130 S. Ct. at 1768, n.3. The Fifth, Eighth, and Eleventh Circuits have held that "manifest disregard" is no longer valid as a standalone basis for vacatur of an arbitration award after *Hall Street*. *Citigroup Global Markets, Inc. v. Bacon,* 562 F.3d 349, 358 (5th Cir. 2009) (manifest disregard is "no longer an independent nonstatutory ground" to vacate an arbitration award); *Medicine Shoppe International, Inc. v. Turner Investments, Inc.*, 614 F.3d 485, 489 (8th Cir. 2010) (same); *Frazier v. Citi Financial Corp.*, 604 F.3d 1313, 1324 (11th Cir. 2010) (same); *Southern Communications Services, Inc. v. Thomas*, 720 F.3d 1352, 1358 (11th Cir. 2013) (same). Courts in the Second, Fourth, Sixth, and Ninth Circuits continue to give life to "manifest disregard" as tantamount to an arbitrator exceeding the arbitrator's authority in violation of Section 10(4) of the FAA. *Comedy Club, Inc. v. Improv West Assocs.,* 553 F.3d 1277, 1281 (9th Cir. 2009) (manifest disregard of the law "remains a valid ground for vacatur" as "shorthand" for the statutory ground in Section 10(4) of the FAA where a court may vacate an award rendered by arbitrators who exceeded their statutory authority); *Stolt-Nielsen SA v. Animalfeeds International Corp.*, 548 F.3d 85, 94-96 (2d Cir. 2008), *rev'd on other grounds*, 130 S. Ct. 1758 (2010) (same); *Coffee Beanery, Ltd. v. WW, LLC,* 300 Fed. Appx. 415, 419 (6th Cir. 2008) (unpublished opinion), cert. denied 130 S. Ct. 81 (2009) ("In light of the Supreme Court's hesitation to reject the 'manifest disregard' doctrine in all circumstances, we believe it would be imprudent to cease employing such a universally recognized principle. Accordingly, this Court will follow its well-established precedent here and continue to employ the 'manifest disregard' standard"). The Seventh Circuit continues to give life to "manifest disregard" where an arbitrator directs parties to "violate the legal rights of third persons." "Thus an award directing the parties to form a cartel, and fix prices or output could be vacated…." "[W]hat the parties cannot do through an express contract they cannot do through an arbitrator." *Affymax, Inc. v. Ortho-McNeil-Jansen Pharms. Inc.,* 660 F.3d 281 284 (7th Cir. 2011) citing *George Watts & Sons, Inc. v. Tiffany & Co.*, 248 F.3d 577 (7th Cir. 2001). *Affymax* adds that no decision in the 7th Circuit that gives "manifest disregard" a broader context "survives *Hall Street Associates.*" *Id.* at 285. *See also Titan Tire Corp. of Freeport v. United Steel*, 734 F.3d 708, 717 n. 8 (7th Cir. 2013) (*Hall Street* does not overrule *E. Associated Coal Corp. v. United Mine Workers of Am.*, 531 U.S. 57, 62 (2000) or W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, 461 U.S. 757, 766 (1983) which "recognized a public policy exception" to the general prohibition on overturning arbitrator awards). The Tenth Circuit has declined to decide the question to date. *Abbott v Law Office of Patrick Mulligan*, 2011 U.S. App. LEXIS 19468 (10th Cir. 2011) (declining to decide the continuing survival of "manifest disregard" because the case did not present the "exceedingly narrow circumstances supporting vacatur based on manifest disregard of the law" and then confirming the award in question because there was a contractual basis for the panel's conclusion rendering it "immune from judicial review"). So has the First Circuit. *Ramos-Santiago v. U.S. Postal Service*, 524 F.3d 120, 124, n.3 (1st Cir. 2008) ("We decline to reach the question of whether *Hall Street* precludes a manifest disregard inquiry"); *Kashner Davidson Securities Corp. v. Mscisz*, 601 F.3d 19, 22-23 (1st Cir. 2010) (same). The Fourth Circuit also remains on the fence on the issue. *Wachovia Sec., LLC v. Brand,* 671 F.3d 472, 483 (4th Cir. 2012) (declining to decide whether "manifest disregard" still exists as an independent ground for review or as a judicial gloss" on the enumerated grounds for vacatur in Section 10 of the FAA); *Raymond James Financial Services, Inc. v. Bishop,* 596 F.3d 183, 193 (4th Cir. 2010) (same). And so does the Third Circuit. *Bellantuono v. Icap Securities USA*, 2014 U.S. App. LEXIS 1859, *12-13 (3rd Cir. Jan. 30, 2014) (same).

clause is an ancillary part of the document, but depending upon the character of the contracting party on the other side, it may prove to be a useful term in an arbitration clause, especially if the arbitration rules being utilized are silent on the subject and the law of the place of arbitration is not illuminating on this topic.

Ethics Rules. Should certain minimum ethics rules be added to an arbitration clause? For domestic arbitrations, this is not necessary. Lawyers operating under the model rules of professional conduct will be bound by them irrespective of what text is added to an arbitration clause. But in international arbitration, lawyers may not be regulated by a Bar with rules or codes of conduct. Certain basic rules—duty of candor to the tribunal, precluding contacts with represented persons, return of inadvertently produced privileged documents—are among the rules that could be considered for an arbitration clause.

FAA Versus State Law. The FAA governs all domestic arbitration clauses that involve interstate commerce, 9 U.S.C. § 2,[34] and preempts inconsistent provisions of state law. Parties should provide for entry of a judgment under Section 9 of the FAA.[35]

Arbitrators' Authority. Should the arbitrator be given authority to determine whether the arbitration agreement is enforceable? Doing so may avoid resort to a judicial forum to determine whether an arbitration agreement is valid.[36]

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[34] "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Under Section 1, "'commerce', as herein defined, means commerce among the several States or with foreign nations…."

[35] See Section 9 of the FAA which provides in pertinent part: "If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made."

[36] See *Rent-A-Center West, Inc. v. Jackson*, 561 U.S. 63 130 S. Ct. 2772 (2010). An employment discrimination claimant had signed an arbitration agreement as a condition of employment. The arbitration agreement delegated to the arbitrator the authority to resolve any disputes relating to the agreement's enforceability including a claim that the agreement was void or voidable. Specifically, the "Arbitration Procedures" provided that "[t]he Arbitrator... shall have exclusive authority to resolve any dispute relating to the... enforceability... of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable." The Supreme Court explained that this delegation provision "is an agreement to arbitrate threshold issues concerning the arbitration agreement," and that the Court has "recognized that parties can agree to arbitrate 'gateway' questions of 'arbitrability' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." (Citations omitted.) The Court added that arbitration is a matter of contract and an agreement to arbitrate a gateway issue "is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other. The additional agreement is valid under § 2 [of the FAA] 'save upon such grounds as exist at law or in equity for the revocation of any contract,' and federal courts can enforce the agreement by staying federal litigation under § 3 and compelling arbitration under § 4." 130 S. Ct. at 2777-78. The Court then held that the delegation provision was valid under § 2 because the claimant had only challenged the validity of the arbitration agreement. "The District Court correctly concluded that Jackson challenged only the validity of the contract as a whole," 130 S. Ct. 2779, and not the delegation provision. Cf. *BG Group plc v. Republic of Argentina*, 134 S. Ct. 1198 (2014) (holding that in a bilateral investment treaty, a local litigation requirement was a procedural precondition within the authority of the arbitral tribunal to interpret, not a jurisdictional condition that precluded arbitration until it was satisfied which a court should address); *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068, n.2 (2013) (enforcing an arbitration clause against Oxford Health that was interpreted by the arbitrator as permitting a class action but explaining that a different question may have been presented had Oxford argued that the availability of class arbitration is a question of arbitrability. Calling this question a "gateway" matter "such as whether parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy," are, the Court held, "presumptively for courts to decide").

Negotiation and Mediation. Is there a reason why a time period for negotiation and, if that fails, mediation should not be built into the arbitration agreement? Reasonable business people can resolve disputes and mediation gives parties an opportunity to evaluate risk and cost before an arbitration begins.[37]

Emergency or Interim Measures. Is there a potential that interim measures will be sought? If so, it will make sense to evaluate the various institutional rules on appointment of emergency arbitrators and the standards by which interim measures can be awarded.

Confidentiality Versus Privacy. Arbitration is private. That does not mean it will be confidential. Institutional rules may give the arbitrator authority to order arbitrants to protect the confidentiality of documents but there is no guarantee an arbitrator or a tribunal will do so. If parties want the process to be confidential they should contract for confidentiality subject to standard exceptions (e.g., required governmental disclosures or requirements of laws or regulations).

As noted earlier, this list is not intended to be all-encompassing, but it should provide quite of bit of food for thought in deciding what an arbitration agreement should look like in a particular set of circumstances.

IS THERE A "BEST" METHOD FOR APPOINTING AN ARBITRAL TRIBUNAL? DOES THE ANSWER CHANGE IF THE ARBITRATION IS AN INTERNATIONAL ARBITRATION VERSUS A DOMESTIC ARBITRATION?

The best method of appointing an arbitral tribunal is the one that results in the appointment of an arbitrator or a panel of three arbitrators who is or are impartial, fair, diligent, cost-sensitive, time-sensitive, thoughtful, and fully capable of comprehending the issues in controversy and managing lawyers and witnesses in a firm but even-handed manner with no scheduling conflicts that will delay the resolution of the matter.

Unfortunately, no method guarantees such appointments. So let's explore here some of the pros and cons of various appointment methods in domestic arbitration.[38]

Where the tribunal consists of a sole arbitrator, the parties may consider selecting the person up front as part of the arbitration agreement. Why do this if a dispute may never arise? Parties are less likely to posture at this juncture and more likely to identify someone who all of the parties trust. And they avoid the time and effort of trying to identify an agreeable sole arbitrator after a dispute arises. If the arbitration is an "ad hoc" arbitration, i.e., a non-administered arbitration, it eliminates the need for a selection process in the arbitration agreement as well.

If parties have not pre-selected the arbitrator and a dispute arises, they should certainly try to agree on the arbitrator. If they cannot, and assuming the arbitration is administered, then the rules of the administering authority will control selection. What rules should be selected? Perhaps the better question is from what roster

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[37] For a discussion of international mediation rules, see Barkett, J., *Avoiding the Cost of International Commercial Arbitration: Is Mediation the Solution?* in Contemporary Issues in International Arbitration and Mediation – The Fordham Papers (Martinus Nijhoff, New York. 2011).

[38] I address appointment of arbitrators in international arbitration in a separate paper. Barkett J., "*Chess Anyone? Selection of International Commercial Arbitration Tribunals"* (Shook, Hardy & Bacon LLP 11th Annual Update on the Law, Kansas City, June 25, 2014).

of arbitrators do the arbitrants want to have their sole arbitrator selected? AAA, JAMS, and CPR all have rosters of arbitrators that they will choose from if the parties do not agree on the sole arbitrator. Those names will be presented to the parties according to governing rules of each organization.

In the case of the AAA, a list system will be used. AAA Rule R-11(a) and (b)[39] provide for circulation of a list of ten names from which the AAA hopes the parties will agree on the arbitrator. If they cannot, the parties strike names objected to, and number the remaining names in order of preference. If for any reason this system does not result in the selection of an arbitrator, the AAA has the power to appoint the arbitrator without the submission of additional lists.[40] Rules R11 (a) and (b) provide in full:

> *(a) If the parties have not appointed an arbitrator and have not provided any other method of appointment, the arbitrator shall be appointed in the following manner: The AAA shall send simultaneously to each party to the dispute an identical list of 10 (unless the AAA decides that a different number is appropriate) names of persons chosen from the National Roster. The parties are encouraged to agree to an arbitrator from the submitted list and to advise the AAA of their agreement.*
>
> *(b) If the parties are unable to agree upon an arbitrator, each party to the dispute shall have 15 days from the transmittal date in which to strike names objected to, number the remaining names in order of preference, and return the list to the AAA. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of an arbitrator to serve. If the parties fail to agree on any of the persons named, or if acceptable arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the AAA shall have the power to make the appointment from among other members of the National Roster without the submission of additional lists.*

JAMS also uses a list system if facilitation efforts by JAMS fail to produce consensus on the arbitrator.[41] JAMS will send the parties a list of five names for a sole arbitrator. Two names can be stricken and the three must be ranked in order of preference. The arbitrator with the highest ranking is appointed. If for any reason this process does not work, JAMS will designate the arbitrator. JAMS Rules 15(a)-(e) provide in full:

> *(a) Unless the Arbitrator has been previously selected by agreement of the Parties, JAMS may attempt to facilitate agreement among the Parties regarding selection of the Arbitrator.*
>
> *(b) If the Parties do not agree on an Arbitrator, JAMS shall send the Parties a list of at least five (5) Arbitrator candidates in the case of a sole Arbitrator and ten (10) Arbitrator*

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[39] The AAA Commercial Arbitration Rules (October 1, 2013) can be found at: https://www.adr.org/aaa/faces/rules/searchrules/rulesdetail?doc=ADRSTG_004130&_afrLoop=14539756199400 98&_afrWindowMode=0&_afrWindowId=j4lsn79ep_139#%40%3F_afrWindowId%3Dj4lsn79ep_139%26_afrLoop%3D1453975619940098%26doc%3DADRSTG_004130%26_afrWindowMode%3D0%26_adf.ctrl-state%3Dj4lsn79ep_199.

[40] Hence, if for some reason a party strikes all the names on the list, it will cede to the AAA the selection of an arbitrator from other persons on the AAA's National Roster.

[41] The JAMS Comprehensive Arbitration Rules & Procedures (October 1, 2010) can be found at: http://www.jamsadr.com/rules-comprehensive-arbitration/.

candidates in the case of a tripartite panel. JAMS shall also provide each Party with a brief description of the background and experience of each Arbitrator candidate. JAMS may replace any or all names on the list of Arbitrator candidates for reasonable cause at any time before the Parties have submitted their choice pursuant to subparagraph (c) below.

(c) Within seven (7) calendar days of service upon the Parties of the list of names, each Party may strike two (2) names in the case of a sole Arbitrator and three (3) names in the case of a tripartite panel, and shall rank the remaining Arbitrator candidates in order of preference. The remaining Arbitrator candidate with the highest composite ranking shall be appointed the Arbitrator. JAMS may grant a reasonable extension of the time to strike and rank the Arbitrator candidates to any Party without the consent of the other Parties.

(d) If this process does not yield an Arbitrator or a complete panel, JAMS shall designate the sole Arbitrator or as many members of the tripartite panel as are necessary to complete the panel.

(e) If a Party fails to respond to a list of Arbitrator candidates within seven (7) calendar days after its service, JAMS shall deem that Party to have accepted all of the Arbitrator candidates.

CPR also uses a list system of five names where the parties have not agreed on the sole arbitrator.[42] No strikes are allowed. Rather, the parties rank the names on the list in order of preference and the person with the highest preference collectively is appointed. If there is a tie, CPR can designate either candidate. Again, if the procedure fails for any reason, CPR appoints the arbitrator. CPR Rule 6.2 provides in full:

6.2 Except where a party has failed to designate the arbitrator to be appointed by it, CPR shall proceed as follows:

a. CPR shall jointly convene the parties by telephone to discuss the selection of the arbitrator(s).

b. Thereafter, CPR shall provide to the parties a list of candidates, from the CPR Panels, of not less than five candidates if one arbitrator is to be selected, and of not less than seven candidates if two or three arbitrators are to be selected. Such list shall include a brief statement of each candidate's qualifications, availability and disclosures in writing of any circumstances that might give rise to justifiable doubt regarding the candidate's independence or impartiality as provided in Rule 7. Each party shall number the candidates in order of preference, shall note any objection it may have to any candidate, and shall deliver the list so marked to CPR, which, on agreement of the parties, shall circulate the delivered lists to the parties. Any party failing without good cause to return the candidate list so marked within 10 days after receipt shall be deemed to have assented to all candidates listed thereon. CPR shall

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[42] The CPR Administered Arbitration Rules (July 1, 2013) can be found at: http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/785/7113-Administered-Arbitration-Rules-Effective-July-1-2013.aspx.

appoint as arbitrator(s) the nominee(s) willing to serve for whom the parties collectively have indicated the highest preference and who appear to meet the standards set forth in Rule 7. If a tie should result between two candidates, CPR may designate either candidate.

If this procedure for any reason should fail to result in designation of the required number of arbitrators or if a party fails to participate in this procedure, CPR shall appoint a person or persons whom it deems qualified to fill any remaining vacancy.

If parties believe that all arbitrators are created equally, then the rosters do not matter and the various list systems should produce an acceptable arbitrator.

Where a tribunal consists of three arbitrators, many parties opt for a system where each side or the parties on one side appoint one arbitrator, the other party or the parties on the other side appoint one arbitrator, and the two party-appointed arbitrators select the chair of the tribunal. If for any reason a party fails to make the appointment, or parties on one side cannot agree on the appointment, and the arbitration is being administered, the governing rules dictate that the administering authority will make the appointment either outright or by use of the list system. AAA Rule R12(c), 13(c); JAMS Rule 15; CPR Rules 5.5, 6.1, 6.3. Both the AAA and CPR rules explicitly require party-appointed arbitrators to satisfy their respective standards for arbitrator qualification. AAA Rules R-3(b), R-18[43]; CPR Rule 5.1(c)[44]. JAMS does not have an explicit rule, but it is implied by JAMS Rule 15(h).[45]

Where the administering authority is tasked with the appointment of the tribunal, the list systems described above will be followed.

If one believes that the administering authority knows the arbitrators on its roster well enough and will pick able arbitrators best suited for the matter, parties might consider allowing the authority to select the panel without use of the list system.

Whether for a sole arbitrator or for a three-person tribunal, parties can also consider establishing minimum criteria that candidates have to meet. The criteria must be reasonable; there has to be a pool of candidates that could meet the criteria. Depending upon the circumstances, parties might also consider developing their own roster of pre-approved candidates from which the tribunal must be chosen

In my informal polling of parties to discuss their arbitration experiences, I have concluded that a positive arbitration experience is almost universally directly related to the performance of the arbitrator or the panel of arbitrators. When I have inquired about the selection method, the answers are as varied as the methods above. In other words, every method can produce an acceptable tribunal but no method is fail safe.

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[43] "Where the parties have agreed that each party is to name one arbitrator, the arbitrators so named must meet the standards of Section R-18 with respect to impartiality and independence unless the parties have specifically agreed pursuant to Section R-18(b) that the party-appointed arbitrators are to be non-neutral and need not meet those standards." AAA Rule R-13(b).

[44] "Where a party has designated an arbitrator for appointment, CPR will query such candidate for their availability and request that the candidate disclose in writing any circumstances that might give rise to justifiable doubt regarding the candidate's independence or impartiality…." CPR Rule 5.1(c).

[45] "(h) Any disclosures regarding the selected Arbitrator shall be made as required by law or within ten (10) calendar days from the date of appointment. The obligation of the Arbitrator to make all required disclosures continues throughout the Arbitration process. Such disclosures may be provided in electronic format, provided that JAMS will produce a hard copy to any Party that requests it." JAMS Rule 15(h).

ARE PARTY-APPOINTED ARBITRATORS NEUTRAL?

Party-appointed arbitrators should be neutral. In domestic arbitrations, this may not be the case. The arbitration agreement may state otherwise, for example. Or the rules of an administering body may be silent on the subject or allow party-appointed arbitrators to be non-neutral.

The AAA commercial arbitration rules allow a party-appointed arbitrator to be non-neutral if the parties' written arbitration agreement so provides. Rule R-13(b) specifically provides: "Where the parties have agreed that each party is to name one arbitrator, the arbitrators so named must meet the standards of Section R-18 with respect to impartiality and independence unless the parties have specifically agreed pursuant to Section R-18(b) that the party-appointed arbitrators are to be non-neutral and need not meet those standards." Rule 18(b) then provides: "The parties may agree in writing, however, that arbitrators directly appointed by a party pursuant to Section R-13 shall be non-neutral, in which case such arbitrators need not be impartial or independent and shall not be subject to disqualification for partiality or lack of independence."

The JAMS arbitration rules also allow a party-appointed arbitrator to be non-neutral if the parties have agreed that they will be. Rule 7(c) provides: "Where the Parties have agreed that each Party is to name one Arbitrator, the Arbitrators so named shall be neutral and independent of the appointing Party unless the Parties have agreed that they shall be non-neutral."

In contrast, Rule 7.1 of CPR's Administered Arbitration Rules requires that all arbitrators act as neutrals. It provides: "Each arbitrator shall be independent and impartial."

In international commercial arbitrations party-appointed neutrals are always to act as neutrals. Thus, unlike its domestic AAA counterpart, ICDR Article 13.1 provides: "Arbitrators acting under these Rules shall be impartial and independent and shall act in accordance with the terms of the Notice of Appointment provided by the Administrator." Similarly, JAMS takes a different approach internationally than it does domestically. Article 8.1 of the JAMS International Arbitration Rules[46] also requires impartiality:

> *Arbitrators acting under these Rules will be impartial and independent. Each arbitrator will disclose in writing to the Administrator and to the parties at the time of his or her appointment and promptly, upon there arising during the course of the arbitration, any circumstances that might give rise to justifiable doubt regarding that arbitrator's independence or impartiality. Such circumstances include bias, interest in the result of the arbitration, and past or present relationships with a party or its counsel.*

And like its domestic counterpart, in Article 7.1 the CPR Rules for Non-Administered Arbitration of International Disputes[47] also require party-appointed arbitrators to be neutral: "Each arbitrator shall be independent and impartial."

Similarly Rule 5.2 of the LCIA Arbitration Rules[48] provides: "All arbitrators conducting an arbitration under these Rules shall be and remain at all times impartial and independent of the parties; and none shall act in the

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[46] http://www.jamsadr.com/international-arbitration-rules/.

[47] http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/610/2007-CPR-Rules-for-Non-Administered-Arbitration-of-International-Disputes.aspx.

[48] http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx.

arbitration as advocates for any party. No arbitrator, whether before or after appointment, shall advise any party on the merits or outcome of the dispute." Article 11 of the ICC Rules of Arbitration[49] expressly requires impartiality as well: "Every arbitrator must be and remain impartial and independent of the parties involved in the arbitration. So does Article 11 of the UNCITRAL Arbitration Rules:[50]

> *When a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties and the other arbitrators unless they have already been informed by him or her of these circumstances.*[51]

Internationally, based on a study of whether party-appointed arbitrators dissent more in favor of the party that appointed them, some have questioned whether the impartiality required by the various arbitration rules is achievable.[52] But, in the author's experience at least, international arbitrators adhere to the impartiality requirements of all international arbitration rules.

While there may always be suspicions that a party-appointed arbitrator may not be neutral in a domestic arbitration, in my experience again, I have always found party-appointed arbitrators to act as neutrals. And where the parties' agreement is silent and thus the party-appointed arbitrator is supposed to be neutral, if there is any hint that this may not be the case, the chair of an arbitration tribunal is most assuredly going to ignore the arguments made by that arbitrator. Phrased another way, the best strategy to obtain a just arbitration award that will represent fair consideration of the facts and law presented is to name party-appointed arbitrators who act as neutrals.

SHOULD A PARTY BE ALLOWED TO SPEAK WITH ITS PARTY-APPOINTED ARBITRATOR ABOUT CANDIDATES FOR CHAIR OF THE TRIBUNAL?

Normally, a party-appointed arbitrator does not have contact with the party that appointed the person with one exception. It is generally accepted that there can be communications with the party over the selection of the chair of the tribunal.

In my experience, however, the best practice is to trust the party-appointed arbitrators to make a good choice. And even if input is sought and provided, it is also prudent not to give the party veto power over the chair, or the party-appointed arbitrators will reach an impasse that will have to be resolved by a court or the administering authority.

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[49] http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/.

[50] http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf.

[51] Article 12 of the UNCITRAL rules adds: "Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence."

[52] Albert Jan Van den Berg, "Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration," p. 824, http://www.arbitration-icca.org/media/0/12970228026720/van_den_berg--dissenting_opinions.pdf (in a study of dissents in 150 investment treaty arbitrations, a party-appointed arbitrator issued a dissenting opinion in 34 cases "but nearly all of the dissents were issued by the arbitrator appointed by the party that lost the case in whole or in part").

CAN AN ARBITRATOR SANCTION A PARTY? A PARTY'S ADVOCATE?

Litigants are familiar with Rule 37 of the Federal Rules of Civil Procedure. They are also familiar with the doctrine of "inherent authority" that permits a court to sanction a party in the absence of a rule or statute. Do arbitrators have similar resources or authority? The answer is a qualified "yes." I first examine a number of decisions addressing sanctions, awards rendered by an arbitration panel. I then look at arbitral rules on the topic.

Case Law

A number of decisions provide a good survey of the applicable case law.

Inter-Chem Asia 2000 Pte. Ltd. V. Oceana Petrochemicals AG, 373 F. Supp. 2d 340 (S.D.N.Y. 2005)

In this confirmation/vacatur matter, the arbitrator had issued an order to both parties to produce documents in response to production requests. The order also required Oceana to submit the bases for its damages claim by a fixed date. The arbitrator issued a subsequent order requiring the parties to produce the documents the parties intended to submit at the hearing. *Id.* at 343-44.

At the arbitration hearing held on May 24, 2004, the arbitrator asked Oceana to produce additional documents. Oceana responded on June 1. The arbitrator regarded several of the documents produced on June 1 as "highly relevant" to the May 24 hearing. Oceana insisted, however, that none of the documents produced on June 1 were required to have been produced earlier under AAA's rules. The arbitrator took a different view. He described Oceana's production prior to the May 24 hearing as "'peculiarly sparse and unrevealing'" and determined that the June 1 production "revealed critical documents and evinced 'patently dilatory and evasive document production carried out'" by Oceana's lawyer (DiDonna) for his client. *Id.* At the time AAA Rules 21 and 31 mandated that documents required by the arbitrator and documents for use at the hearing had to be produced. *Id.*, n.7. As a result, the arbitrator imposed a sanction of $70,000 on Oceana *and* DiDonna as part of an award that favored Inter-Chem on the merits of the parties' dispute. *Id.* at 345.

Oceana sought vacatur of the award. *Id*. With respect to the sanctions, portion of the award, Oceana argued that the arbitrator exceeded his powers, one of the grounds for vacatur in Section 10 of the FAA. *Id.* at 352. Saying that vacatur on this ground is "rare,"[53] the district court proceeded to determine the scope of the arbitrator's authority. *Id.*

The arbitrator had stated in his award that the then current international rules of the AAA "are silent on the question of sanctions" but the district court chose to focus its analysis not on what the rules did not say, but instead on what they did say. Under Rule 43(d)(2) of the AAA's rules in effect at the time, where all parties request attorneys' fees, the arbitrator has authority to award them.[54] That the arbitrator had referenced the award of attorneys' fees as a sanction, "does not change the fact that such an award was within the scope of the Arbitrator's authority." *Id.* at 354. Explaining that Second Circuit case law allows for confirmation of an

[53] The district court wrote: "Indeed, the Second Circuit has 'consistently accorded the narrowest of readings to the Arbitration Act's authorization to vacate awards where the arbitrators exceeded their powers.' *In re Andros Compania Maritima, S.A., Marc Rich & Co., A.G.*, 579 F.2d 691, 703 (2d Cir.1978) (internal citations, quotation marks and alterations omitted)." 373 F. Supp. 2d at 352.

[54] This rule has been renumbered AAA Rule R-47(d)(ii).

award where an award is open to more than one possible reading and at least one of these readings is based on a colorable interpretation of law,[55] the district court upheld the award on the following logic:

> *The Arbitration Award lists the award of attorney's fees in the section entitled "Award of the Arbitrator" simply as "Legal fees," not as sanctions. Additionally, in the section of the Award entitled "Sanctions," the Arbitrator (i) refers to the sanctions as the granting of InterChem's request for legal fees, (ii) indicates the total amount of attorney's fees submitted by InterChem in its request for fees and fixes a portion of that amount as the amount of the sanctions, and (iii) refers to the award as being compensatory to InterChem. (See Arbitration Award at 14.) The Court finds that one plausible reading of the Award, therefore, is that the Arbitrator sought to award attorney's fees in this matter pursuant to the parties' consent, regardless of whether the fees were categorized as sanctions. Under this interpretation of the Award, the grant of attorney's fees need not be vacated so long as it was within the Arbitrator's authority to award attorney's fees. As stated previously, the Court finds that the awarding of attorney's was within the Arbitrator's authority.*

Id. at 354-55.

Of course, the problem with this analysis is that the arbitrator awarded fees not just against Oceana but also against its lawyer, DiDonna. That is a sanction. Recognizing the potential vulnerability of its analysis, the district court then offered an alternative basis to uphold the attorneys' fee award. It cited the Ninth Circuit's decision in *Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056 (9th Cir. 1991) that upheld an attorneys' fee award by an arbitrator based on the "bad faith" exception to the "American Rule" that parties bear their own fees.[56] While the arbitrator did not make a "bad faith" finding, in rejecting vacatur the district court was willing to interpret the arbitrator's words as the equivalent of a bad faith finding:

> *In this case, although the Arbitrator did not use the term "bad faith" in imposing an award of attorney's fees against Oceana and DiDonna and said that he did not think that DiDonna was "malevolent," he accused Oceana and DiDonna of evasive and dilatory document production and of treating their opponent and the Arbitrator "unfairly." These statements can be interpreted as a charge of bad faith justifying the shifting of fees to Oceana. Although Oceana contests the finding of the Arbitrator that it did not comply with the AAA Commercial Rules for document production, see supra Part III.B.2, this Court is not authorized to revisit the*

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[55] The district court relied on *Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, (2nd Cir. 2003) and *Westerbeke Corp. v. Daihatsu Motor Co., Ltd.,* 304 F.3d 200 (2nd Cir. 2002). In *Duferco*, the court of appeals confirmed an arbitral award explaining: "However, whether appellees actually raised the issues reflected in the district court's reading of the award is immaterial. In construing an arbitral award we look only to plausible readings of the award, and not to probable readings of it. Even absent a plausible reading free of error, we would confirm the award if we independently found legal grounds to do so." 333 F.3d at 392. In *Westerbeke*, then-judge Sotomayor wrote: We are obliged to give the arbitral judgment the most liberal reading possible. When reviewing an award where the arbitration tribunal has failed to detail its underlying factual findings, for example, we will confirm the award if we are able to discern any colorable justification for the arbitrator's judgment, even if that reasoning would be based on an error of fact or law." 304 F.3d at 212, n.8 (citations omitted). Both of these decisions involved a "manifest disregard of the law" standard of review. As discussed above, the Supreme Court's decision in *Hall Street* that the FAA provides the exclusive grounds to overturn an arbitral award suggests that this common law standard of review may no longer be good law.

[56] The district court wrote: "[D]espite the 'American Rule,' under some circumstances, the losing party can be assessed attorney fees where that party "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." 373 F. Supp. 32d at 355 (quoting from *Todd Shipyards Corp. v. Cunard Line*, 943 F.2d 1056, 1064 (9th Cir. 1991).

> *factual and legal findings of the arbitrator where those findings are at least "barely colorable," as they are here. (Citation omitted). Therefore, the Court finds that the award of attorney's fees against Oceana was within the Arbitrator's authority and does not warrant vacatur of the award.*

Id. at 355.

The district court did not include DiDonna in this conclusion, however, because it then proceeded to hold that the arbitrator had no authority to sanction a party's attorney. Rejecting a number of other decisions on the ground that the reasoning was *dicta* or the decision was factually distinguishable because authority was provided to award any sanction that a court could award,[57] the district court held that neither the arbitration agreement nor the AAA rules at the time gave the arbitrator the authority to sanction a party's lawyer.

> *[T]he parties' agreement did not explicitly grant the Arbitrator power to afford any remedy available in the courts. The arbitration between Oceana and InterChem was governed by the AAA Commercial Rules, which limit the scope of an arbitrator's authority to the "scope of the agreement of the parties." See Rule 43(a). The agreement of the parties nowhere mentioned the imposition of sanctions, or the applicability of the Federal Rules of Civil Procedure for imposing sanctions.*

Id. at 358.

The district court then addressed the inherent authority of an arbitrator to "protect the forum." The court acknowledged the case law that gives courts inherent authority to punish bad faith conduct with a sanction, but

[57] The district court explained: "[T]hese cases do not control the Court's analysis because either (1) the court's pronouncements in those cases were dicta, *see, e.g., Bigge Crane & Rigging Co. v. Docutel Corp.,* 371 F. Supp. 240, 246 (E.D.N.Y.1973) (noting that 'arbitrators ... may be able to devise sanctions if they find that [a defendant] has impeded or complicated their task by refusing to cooperate in pretrial disclosure of relevant matters,' but without further explanation or citation); *see also* F*orsythe Int'l, S.A. v. Gibbs Oil Co. of Texas*, 915 F.2d 1017, 1023 n. 8 (5th Cir.1990) (stating that '[a]rbitrator's may, for example, devise appropriate sanctions for abuse of the arbitration process,' and citing only *Bigge Crane & Rigging*); *Pisciotta v. Shearson Lehman Bros., Inc.,* 629 A.2d 520, 524 (D.C.1993) (noting that '[c]ourts have recognized the authority of arbitrators to impose sanctions, presumably including costs and attorney's fees, for misconduct such as discovery abuses revealed during the arbitration proceeding,' and citing *Forsythe* and *Bigge Crane & Rigging*), or (2) are distinguishable from the facts of this case, *see, e.g., Polin v. Kellwood,* 103 F.Supp.2d 238, 264-65 (S.D.N.Y.2000) ("Polin I") (finding that arbitrators, who were authorized under the AAA National Rules for the Resolution of Employment Disputes to grant any relief 'that would have been available to the parties had the matter been heard in court,' acted within the scope of their authority in awarding sanctions against an attorney); *First Preservation Capital v. Smith Barney, Harris Upham & Co.*, 939 F. Supp. 1559, 1565, 1567 (S.D.Fla.1996) (considering an arbitration governed by the National Association of Securities Dealers' code of arbitration and stating '[t]he Court also believes that arbitrators have the power to formulate appropriate sanctions stemming from their considerable control over process,' without citing authority for the proposition)." 373 F. Supp. 2d at 356.

said it could not find any decision giving an arbitrator comparable authority.[58] The district court added that finding inherent authority would violate the principle that the arbitrator's authority is circumscribed by the parties' agreement that, while it could have done so, failed to provide authority for sanctions against a party's counsel:

> *That principle flows from the basic understanding that arbitration is a consensual arrangement meant to reflect a mutual agreement to resolve disputes outside of the courtroom. (Citations omitted.) InterChem and Oceana could have included in the Contract a clause bestowing on the Arbitrator the authority to award sanctions for either parties' abuse or frustration of the arbitration process. Granting the Arbitrator authority beyond that granted to him by the parties conflicts with the most basic principles underlying the arbitration process. (Footnote omitted.)*

Id. at 358-59.

Superadio Limited Partnership v. Winstar Radio Productions, LLC 844 N.E.2d 246 (Mass. 2006)

This case involved a radio network agreement in which the parties shared advertising revenues. In an AAA arbitration in which Massachusetts law was applicable, Superadio sought $150,000 in damages. "Baby Love" (Winstar) counterclaimed seeking $841,239 in damages. 844 N.E.2d at 248. In response to Baby Love's claims that Superadio was not complying with discovery requests, the three-member panel entered an order directing Superadio to do so or pay Baby Love $1,000 per day until Superadio complied or the hearing began, whichever occurred first. The panel also notified both parties that "the failure to produce discovery would result in the exclusion of such discovery as evidence at the arbitration hearing." *Id.* at 249. Superadio had the information requested, but did not comply with the discovery order and withdrew its demand for arbitration. Baby Love proceeded with the arbitration on its counterclaim. *Id.*

After the hearing on the counterclaim, the panel decided that Superadio had underreported the amount of advertising revenues that it owed, but that Superadio's failure to comply with discovery prevented Baby Love from proving the amount of its claim to those advertising revenues. It further determined that it had authority to sanction Superadio and imposed a sanction in the amount of $271,000 representing $1,000 per day from the date by which Superadio was required to produce discovery to the date of the hearing. *Id.*

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[58] The district court analyzed the case law as follows: "The arbitrators in *Polin* [*Polin v. Kellwood Co.,* 132 F. Supp. 2d 126 S.D.N.Y. 2000)] also stated as a basis for their decision to impose sanctions on the attorney that they had 'an obligation to protect the forum,' or, stated differently, inherent equitable authority to award sanctions. *See Polin II*, 132 F.Supp.2d at 134. "A court may, pursuant to its inherent equitable powers, assess attorneys' fees and costs when a party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" *First Nat'l Supermarkets*, 118 F.3d at 898 (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, (1991)). This inherent power derives from "'the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'" *Chambers*, 501 U.S. at 43 (quoting *Link v. Wabash R. Co.*, 370 U.S. 626, 630-31 (1962)); *see also Chambers*, 501 U.S. at 46 ('The imposition of sanctions [where a party has acted in bad faith] transcends a court's equitable power concerning relations between the parties and reaches a court's inherent power to police itself, thus serving the dual purpose of vindicating judicial authority without resort to the more drastic sanctions available for contempt of court and making the prevailing party whole for expenses caused by his opponent's obstinacy.' (internal quotation marks omitted)). However, the arbitrators in *Polin* failed to cite any precedent to support the premise that an *arbitrator* has the inherent authority to award sanctions, and this Court similarly was unable to uncover any such authority. *Cf.* [*Certain Underwriters at Lloyd's v. Argonaut Ins.*, 264 F.Supp.2d 926, 944 (N.D. Cal. 2003)] (denying the argument that an arbitrator has the inherent authority to impose a sanction akin to a civil contempt order)." 373 F. Supp. 2d at 358.

The subsequent award was confirmed at the trial court level but reversed on appeal because the appellate court believed that the panel had no authority to issue the sanctions. Disagreeing, the Massachusetts Supreme Court reinstated the trial court decision confirming the award.

The supreme court's logic was premised upon the word "disputes" both in the arbitration agreement and the applicable AAA rule.

With respect to the agreement, the court noted that the arbitration agreement in issue provided that "any dispute" under the agreement had to be arbitrated. The court explained that "the essence of the dispute" was Superadio's conduct of withholding materials that established Baby Love's damages, "namely, the amount of money owed because of Superadio's alleged violation of the agreement." The supreme court explained that, "Such a matter, damages owed for breach of the agreement, related to the core of the agreement. As such, the dispute was one encompassed by the terms of the agreement." *Id.* at 252.

The court then moved its focus to former Rules 23 and 45(a) of the AAA rules. Rule 45(a) gave arbitrators the authority to grant "any remedy or relief that the arbitrator deems just and equitable" that is within the scope of agreement of the parties.[59] Rule 23(a) and (c) provided that that arbitrators could direct "the production of documents and other information" and were "authorized to resolve any disputes concerning the exchange of information."[60] *Id.* at 252-53. The supreme court held that these rules provided ample authority to impose monetary sanctions under the broad text of the arbitration agreement and the absence of any limiting language prohibiting sanctions for discovery violations:

> *Noteworthy in these rules is the absence of any language limiting the means by which an arbitrator or arbitration panel may resolve discovery disputes, or language restricting the application of the broad remedial relief of rule 45(a) to final awards (and precluding the grant of broad remedial relief to interim awards). The rules, construed together, and supported by the broad arbitration provision in the agreement and the absence of any limiting language prohibiting a monetary sanction for discovery violations, authorized the panel to resolve discovery dispute by imposing monetary sanctions.*

[59] This text now appears in AAA Rule R-47(a).

[60] The new AAA rules have modified this text. Under Rule R-22(a), arbitrators are to "manage any necessary exchange of information" with "a view toward achieving an efficient and economical resolution of the dispute, while at the same time promoting equality of treatment and safeguarding each party's opportunity to fairly present its claims and defenses." Under Rule R-22(b)(i), arbitrators can require parties to exchange documents "in their possession or custody" on which they intend to rely. Under Rule R-22(b)(iii) and (iv) arbitrators can require parties to make available documents, including electronic documents, to the "other party" if certain conditions are met. Then, under Rule R-23, arbitrators "shall have the authority to issue any orders necessary to enforce" Rule 22 "and to otherwise achieve a fair, efficient and economically resolution of the case." Included among the arbitrator's enforcement options are Rule R-23(d) and (e): "(d) in the case of willful non-compliance with an order issued by the arbitrator, drawing adverse inferences, excluding evidence and other submissions, and/or making special allocations of costs or an interim award of costs arising from such non-compliance; and (e) issuing any other enforcement orders which the arbitrator is empowered to issue under applicable law."

Id. at 253 (footnote omitted).[61] The supreme court then added: "To give arbitrators control over discovery and discovery disputes without the authority to impose monetary sanctions for discovery violations and noncompliance with appropriate discovery orders, would impede the arbitrators' ability to adjudicate claims effectively in the manner contemplated by the arbitration process." *Id.* Because the panel issued the sanction based on the panel's interpretation of Rules 23(c) and 45(a), Superadio was "bound by the panel's interpretation of the arbitration rules." *Id.*

Millmaker v. Bruso, 2008 WL 4560624 (S.D. Tex. Oct. 9, 2008)

In this matter, a company (Pentomino) provided the services of an advisor (Millmaker) to an independent oil and gas company (Sovereign). The engagement agreement was signed by Millmaker and Bruso, the president of Sovereign. Disputes under the agreement were to be resolved under ICDR rules. 2008 WL 4560624 at *1. Millmaker was fired by Sovereign. In the resulting arbitration over whether the firing amounted to a breach of contract, Sovereign was found liable for $126,000 for breach of contract and paid this part of the award. The arbitrator also awarded Millmaker $128,754.23 for expenses and attorneys' fees and $14,500 for the administrative fees and costs of the arbitration. As a sanction for what was apparently viewed as reprehensible conduct by Bruso,[62] the arbitrator made Bruso jointly and severally liable with Sovereign to pay these sums. *Id.* Sovereign challenged this part of the award in response to Millmaker's petition to confirm the award.

Without citation to any authority, the arbitrator had determined that he had the authority to impose a sanction against Bruso. *Id.* at *3. Sovereign argued that Bruso could not be sanctioned since he was a not a party to the arbitration agreement. The arbitration agreement incorporated the rules and practices of the ICDR. Since those rules permitted costs only "to a party" to compensate the party for dilatory or bad faith conduct of another party during the arbitration and for apportionment of costs only "among the parties," the district court agreed with Sovereign.

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[61] The Massachusetts Supreme Court cited three cases in support of these principles: *Drywall Sys., Inc. v. ZVI Constr. Co.*, 435 Mass. 664, 667, 761 N.E.2d 482 (2002); *Softkey, Inc. v. Useful Software, Inc.*, 52 Mass. App. Ct. 837, 840, 756 N.E.2d 631 (2001); *Kraft Foods, Inc. v. Office & Professional Employees Int'l Union, Local 1295*, 203 F.3d 98, 102 (1st Cir. 2000). In a footnote, the court acknowledged that contrary authority exists. "We acknowledge the existence of contrary authority, noting that the issue 'has seldom been explored by the courts,' O'Neill, The Power of Arbitrators to Award Monetary Sanctions for Discovery Abuse, 60 Disp. Resol. J. 60, 63 (Jan. 2006), and that each decision likely will depend on the particular language in the parties' respective arbitration agreements. *See, e.g., Certain Underwriters at Lloyd's, London v. Argonaut Ins. Co.,* 264 F.Supp.2d 926, 943–945 (N.D.Cal.2003) (noting 'no categorical ban to an arbitrator's imposition of sanctions for non-compliance with his or her orders, but concluding that panel exceeded authority imposing sanction because neither Federal Arbitration Act nor parties' arbitration contract contained basis for sanction imposed)." 844 N.E.2d at 253, n.7.

[62] The opinion does not contain a description of Bruso's conduct. However, in later approving the amount of the fee award, the district court did discuss why awarding $128,754.23 in legal fees on a contract claim that resulted in damages of $126,000 was not a decision that exceeded the arbitrator's authority: "The arbitrator criticized Sovereign's behavior from the start, finding that when Plaintiff served demand letters upon Sovereign containing 'weighty claims' for breach of contract, Sovereign responded 'over-the-top' by characterizing Plaintiff's claims as "'false,' 'baseless,' 'outlandish,' 'frivolous,' 'spurious,' 'misleading,' 'absurd,' 'fatally flawed,' 'grossly inaccurate,' 'extortion' and 'unlawful.'" Final Award, at 9 n. 12. Moreover, upon sending that response letter, Sovereign immediately commenced the arbitration, seeking a declaratory judgment that Sovereign had not breached the contract. The arbitrator concluded that Sovereign had done this as a 'strategic move, in its mind, to assert control over the process and to take momentum away from [Plaintiff].' *Id.,* at 9. The arbitrator went on to criticize the 'strategy and tactics employed by [Sovereign] in responding, or failing to respond, to properly-propounded discovery requests.' *Id.,* at 11. He found from the evidence that '[Sovereign's CEO] Bruso was playing fast-and-loose with the production process, producing documents only when it served his or [Sovereign's] interest.... It seemed as though every witness sparked new revelations of documents that had not been produced ....' *Id.,* at 11." 2008 WL 4560624 at *7. The district court then added: "Indeed, on this record presenting intertwined claims arising out of the same transaction-and especially given the atrocious behavior of Sovereign that so complicated, obstructed, and protracted the proceedings-there is no showing that the arbitrator "ignore[d] or pa[id] no attention to" governing law, (citation omitted), or that he exceeded his authority." *Id.*

Millmaker also argued that the award against Bruso could be justified by the arbitrator's inherent authority to impose sanctions. But this argument failed because the case law cited by Millmaker in support of this argument involved only parties to an arbitration:[63]

> *Bruso signed the Agreement as President and Chief Executive Officer of Sovereign, not as an individual party to the Agreement. See Document No. 41, ex. A at 7. Thus, he never agreed in a personal capacity to "final and binding" arbitration of any dispute he might have, nor to submit to or to be bound by the decision of any arbitrator. Id. His execution of the Agreement was solely in a representative capacity, and bound only Sovereign, not Bruso, to "final and binding" arbitration. The arbitrator cannot under these facts treat Bruso as being personally subject to his authority under an arbitration agreement to which Bruso himself is not a party.*
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>
> *Therefore, the arbitrator exceeded his power in violation of § 10(a)(4) when he sanctioned nonparty Bruso individually-regardless of how reprehensible Bruso's conduct may have been. The arbitral award against Bruso individually must therefore be VACATED.*

Id. at 4.[64]

ReliaStar Life Insurance Company of New York v. EMC National Life Company, 564 F.3d 81 (2d Cir. 2009)

The court of appeals succinctly stated the question on appeal:

> *[W]e consider whether parties' inclusion in an arbitration agreement of a general statement that each will bear the expenses of its own arbitrator and its own attorneys deprives the arbitration panel of authority to award such expenses as a sanction against a party whom the panel determines failed to arbitrate in good faith.*

565 F.3d at 83.

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[63] These were the cases noted by the district court: "*Bigge Crane & Rigging Co. v. Docutel Corp.*, 371 F. Supp. 240, 246 (E.D.N.Y.1973) (commenting in dicta, without citation or authority, that 'arbitrators ... may be able to devise sanctions if they find that [*a party*] has impeded or complicated their task by refusing to cooperate in pretrial disclosure of relevant matters, (emphasis added)); *accord [Forsythe Int'l S.A. v. Gibbs Oil Co. of Tex.,* 915 F.2d 1017, 1023 n.8 (citing only *Bigge Crane*); *First Pres. Cap., Inc. v. Smith Barney, Harris Upham & Co.*, 939 F. Supp. 1559, 1565-67 (S.D.Fla.1996) (affirming an arbitrator's dismissal of a *party's* case for abuses of the discovery process); *Pisciotta v. Shearson Lehman Bros., Inc.*, 629 A.2d 520, 524-25 (D.C.1993) (acknowledging that '[c]ourts have recognized the authority of arbitrators to impose sanctions, presumably including costs and attorney's fees, for misconduct such as discovery abuses revealed during the arbitration proceeding,' citing only *Bigge Crane* and *Forsythe*); *Young v. Roos-Loos Med. Group*, 135 Cal.App.3d 669, 185 Cal. Rptr. 536, 538 (Cal.Ct.App.1982) (holding that a state district court should have enforced an arbitrator's award of default dismissal against a *party* because of dilatory prosecution); *see also In re Arbitration Between InterChem Asia 2000 Pte. Ltd. v. Oceana Petrochems. AG,* 373 F.Supp.2d 340, 356-59 (S.D.N.Y.2005) (holding that an arbitrator exceeded his authority in sanctioning a nonparty attorney, and explaining that the authorities relied upon by the party seeking enforcement of the sanction-*Bigge Crane, Forsythe, Pisciotta, First Preservation,* among others-were distinguishable or inapposite)." 2008 WL 4560624 at *4, n.4.

[64] The fee award against Sovereign was upheld. Sovereign had argued that because the parties' agreement disclaimed any liability for damages and fees and required that the costs of arbitration "be borne equally by the parties," the arbitrator exceeded his authority in awarding Millmaker's fees against Sovereign. Because the arbitration agreement gave the arbitrator the power to decide "any disputes pertaining to the meaning of effect of this Agreement," and because the correct interpretation of these provisions of the Agreement was disputed during the arbitration, the district court held that the arbitrator did not exceed his authority in deciding to award fees to the prevailing party. 2008 WL 4560624 at *5-6.

The court of appeals' answer was "no." *Id.*

The decision was premised on the breadth of the arbitration clause entered into by the two insurance companies. Article 10.1 of their agreement provided:

> *In the event of any disputes or differences arising hereafter between the parties with reference to any transaction under or relating in any way to this Agreement as to which agreement between the parties hereto cannot be reached, the same shall be decided by arbitration. Three arbitrators shall decide any dispute or difference.*

Id. at 84.

The court of appeals referred to this clause as a "broad" one and held that broad arbitration clauses confer "inherent authority on arbitrators to sanction a party that participates in the arbitration in bad faith." Such a sanction "may include an award of attorney's fees or arbitrator's fees." *Id.* at 86.

The court of appeals discussed a number of precedents to support its holding. *Id.* at 86-87. It first relied on its own decision in *Synergy Gas Co. v. Sasso*, 853 F.2d 59 (2nd Cir. 1988) where the court of appeals agreed with an arbitrator's decision to award attorneys' fees to an employee that had been improperly discharged. The Second Circuit stated that arbitrators occasionally awarded attorneys' fees where a party acted in bad faith and such an award "fairly compensated the party for costs incurred as a result of such actions." *Id. at 86* (citing *Synergy Gas*, 853 F.3d at 65). The court of appeals also cited Ninth and Eleventh Circuit precedents. In *Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056, 1064 (9th Cir.1991), the Ninth Circuit affirmed an award of attorneys' fees for bad faith conduct. The Ninth Circuit explained: "Federal law takes an expansive view of arbitrator authority to decide disputes and fashion remedies. In light of the broad power of arbitrators to fashion appropriate remedies and the accepted 'bad faith conduct' exception to the American Rule, we hold that it was within the power of the arbitration panel in this case to award attorneys' fees." In *Marshall & Co. v. Duke*, 114 F.3d 188, 190 (11th Cir.1997), the parties did not raise a jurisdictional challenge to an attorneys' fee award, but the Eleventh Circuit recognized the authority of arbitrators anyway: "In any event, the arbitrators have the power to award attorney's fees pursuant to the 'bad faith' exception to the American Rule that each party bears its own attorney's fees."

The Second Circuit concluded by focusing on the purpose of arbitration:

> *Indeed, the underlying purposes of arbitration, i.e., efficient and swift resolution of disputes without protracted litigation, could not be achieved but for good faith arbitration by the parties. Consequently, sanctions, including attorney's fees, are appropriately viewed as a remedy within an arbitrator's authority to effect the goals of arbitration.*

564 F.3d at 87.

The court of appeals then held that Article 10.3 of the agreement between the parties that required each party to bear its own fees and costs did not affect the outcome since such a clause contemplates good faith conduct, not bad faith conduct.

> *Nothing in the section, however, signals the parties' intent to limit the arbitrators' inherent authority to sanction bad faith participation in the arbitration. Certainly, nothing in Article X generally, or section 10.3 specifically, references bad faith or sanction remedies.*

> *Accordingly, we have no basis for thinking that the parties to this agreement ever considered the question of whether to limit the arbitrators' authority to sanction bad faith conduct. In contrast, they did expressly confer comprehensive arbitral authority in section 10.1. In light of that conferral, we conclude that section 10.3 is properly construed to reflect the parties' agreement that the arbitrators may not factor attorney's or arbitrator's fees into awards that result from the parties' expected good faith arbitration of a dispute. The section does not signal the parties' intent to limit the conferral of comprehensive authority by precluding an award of attorney's or arbitrator's fees when a party's bad faith dealings create a recognized exception to the American Rule.*

Id. at. 88.

Comerica Bank v. Howsam, 208 Cal. App. 4th 790 (2012)

This case involved the application of California's arbitration statute to an international commercial arbitration award. 208 Cal. App. 4th at 795. Respondents in the arbitration were Canadians who borrowed money from Comerica using forged documents that purported to provide that licensing fees on distribution of certain films were going to be paid directly to Comerica. *Id.* at 797. There were parallel criminal actions against Howsam and another individual who pleaded guilty. The arbitration was stayed during the criminal proceeding and sometime after it resumed, the respondents withdrew. The arbitrator then entered a default and later entered an uncontested award. *Id.* at 800.

About one month before respondents withdrew from the arbitration, on March 15 and 19, 2010, Comerica had filed a motion for sanctions seeking entry of a default award for failure to obey the arbitrator's discovery orders. *Id.* at 813, 815.

Three months after respondents withdrew, on July 16, 2010, the arbitrator determined he had authority to impose monetary sanctions and did so.

> *The arbitrator found that Mr. Coate had "engaged in abusive discovery practices" by: belatedly notifying plaintiff's attorneys that Mr. Howsam would refuse to attend his deposition; this caused plaintiff's counsel to unnecessarily travel to Toronto; and by disingenuously objecting to the videotaping of the deposition which implied Mr. Howsam would be deposed. The arbitrator imposed $10,598.42 in monetary sanctions against Mr. Howsam and Greenlight Film & Television Inc. and their counsel, Mr. Coate. Plaintiff had sought a monetary sanctions award against A. Raymond Hamrick, the attorney for the seven corporations used to secure the loan funding. The arbitrator found Mr. Hamrick had not engaged in any discovery abuses. On July 19, 2010, the arbitrator imposed $1,641,367.17 in costs against defendants as follows: fees and costs in the sum of $1,500,794.50; $34,587.50 in arbitrator fees; and $105,985.17 in sanctions.*

Id. at 815-16.

The arbitrator's award was confirmed, *id.* at 836, but the court's discussion of the discovery orders does not appear in the published opinion pursuant to California Court Rules that allow an appellate court to distinguish between published and unpublished portions of an opinion.

Hamstein Cumberland Music Group v. Williams, 532 Fed. Appx. 538 (5th Cir. 2013)

This "not for publication" opinion[65] involved the reversal of an order modifying the amount of music royalties awarded to Hamstein arising out of a settlement agreement between Hamstein and Williams, before then confirming the award. The court of appeals held that Section 10's limited grounds for modifying an award were not applicable and thus the award should have been confirmed without modification. 532 Fed. Appx. at 543-44.

Hamstein's expert had testified that Hamstein was entitled to $634,641.44 in royalties and pre-judgment interest. The arbitrator awarded this sum, plus additional pre-judgment interest, and $500,000 in attorneys' fees as a sanction for William's conduct in discovery during the arbitration. Williams had

> *consistently failed to respond to discovery ordered by the arbitrator, which included refusing to produce documents, which, Hamstein said, would show royalties that Williams had received following the Settlement's effective date but that should have been paid to Hamstein and which, because of the nature of Hamstein's claim, only Williams possessed.*

Id. at 541.[66] In response to Hamstein's motion for sanctions, Williams cross-moved for sanctions, even seeking a judgment against Hamstein for an alleged failure of Hamstein to respond to discovery requests. The arbitrator rejected Williams' motion, granted Hamstein's motion, awarded Hamstein $500,000 in attorneys' fees and then ordered Williams to respond to Hamstein's discovery, or

> *Williams would not be permitted to present evidence that was not properly disclosed during discovery, which would effectively permit Hamstein to base its damages claim on estimates of the royalties Williams was said to owe Hamstein and would disallow Williams from rebutting these estimates with his own records unless they were previously produced.*

Id. at 541. Williams did not comply with the order and was precluded from challenging Hamstein's royalty estimates.

In a sweeping statement of an arbitrator's authority to sanction a party, the court of appeals rejected Williams' Section 10 argument that the arbitrator exceed his authority. Hedging, the court of appeals used Williams' cross-motion for sanctions to support an alternative holding that by filing this cross-motion, the parties empowered the arbitrator to issue "certain sanctions." The court of appeals held:

> *Williams argues that the arbitrator was not empowered to issue sanctions and therefore exceeded his authority within the meaning of FAA § 10(a)(4). We disagree. First, arbitrators enjoy inherent authority to police the arbitration process and fashion appropriate remedies to effectuate this authority, including with respect to conducting discovery and sanctioning failure to abide by ordered disclosures. See Forsythe Int'l, S.A. v. Gibbs Oil Co., 915 F.2d 1017, 1023 n. 8 (5th Cir.1990). Second, Williams ignores his own conduct, namely cross-*

[65] Under Fifth Circuit Local Rules, this means that the opinion is not precedential. Rule 47.5.4 provides: "Unpublished Opinions Issued on or After January 1, 1996. Unpublished opinions issued on or after January 1, 1996, are not precedent, except under the doctrine of res judicata, collateral estoppel or law of the case (or similarly to show double jeopardy, notice, sanctionable conduct, entitlement to attorney's fees, or the like)."

[66] Williams had failed to respond to multiple requests for information and documents sent three years earlier. 532 Fed. Appx. at 541.

> *moving for sanctions against Hamstein in response to Hamstein's motion for sanctions against Williams and for the exact same reason that Hamstein moved for sanctions in the first place—Williams claimed that Hamstein had failed to respond to discovery that he had requested of Hamstein. The scope of an arbitrator's authority is a function of both the arbitration agreement and the parties' submissions, which include both formal, written submission agreements and merely asking the arbitrator to decide an issue. (Citations omitted). If the parties are permitted to modify the scope of their contractual agreement by submitting additional issues to the arbitrator, then surely the parties may, jointly, empower the arbitrator to issue certain sanctions. Therefore, even assuming that the arbitrator lacked the authority to issue sanctions based solely on the Settlement and his inherent authority to police the arbitration process, the parties' decision to move for sanctions against one another—in fact, Williams reasoned that he was entitled to "death penalty" sanctions because of Hamstein's failure to respond to requested discovery—reveals that both parties sought to confer that power on the arbitrator. Accordingly, we conclude that the arbitrator did not exceed his authority in sanctioning Williams.*

Id. at 543 (footnote omitted).[67]

Seagate Technology, LLC v. Western Digital Corp., 834 N.W.2d 555 (Minn. Ct. App. 2013) appeal pending, __ N.W.2d ___ (Minn. 2014)

This was a misappropriation of trade secrets arbitration under AAA Employment Rules. Respondent Sining Mao (Mao) signed an employment agreement with Seagate that contained the following arbitration clause:

> *Except as stated below, I agree that any dispute or controversy arising out of or relating to any interpretation, construction, performance or breach of this Agreement, shall be settled by arbitration to be held in Hennepin County, Minnesota, in accordance with the rules then in effect of the American Arbitration Association. The arbitrator may grant injunctions or other relief in such dispute or controversy. The decision of the arbitrator shall be final, conclusive and binding on the parties to the arbitration. Judgment may be entered on the arbitrator's decision in any court having jurisdiction. The Company and I shall each pay one-half of the costs and expenses of such arbitration, and each of us shall separately pay our counsel fees and expenses.*

834 N.W.2d at 558. Mao left Seagate to join Western Digital and he and Western Digital were promptly sued by Seagate to prevent disclosure of Seagate's trade secrets.[68] The employment agreement was produced in discovery and both defendants then successfully moved to compel arbitration. The arbitration consumed four years of preparation and 34 hearing days. The arbitrator issued a 27-page decision addressing the merits as well as a sanctions claim brought by Seagate against Mao. *Id.*

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[67] The court of appeals refused to consider Williams' due process argument that he was prevented from presenting evidence material to his case because, having not raised the argument in his initial brief, the argument was waived. 532 Fed. Appx. at 543, n. 4.

[68] In addition to the misappropriation claims against both Mao and Western Digital, Seagate also claimed that Mao had breached his employment contract and his fiduciary duty to Seagate, and that Western Digital had tortuously interfered with Seagate's contract with Mao. 834 N.W.2d at 558.

The arbitrator found that Mao had fabricated documents to show that three of Seagate's trade secrets (numbered 4-6) had been made public before his separation from employment. Mao had added two PowerPoint slides to his copy of a presentation he had given at Seagate; the two additional slides were not part of other copies of the same presentation produced in discovery. *Id.* The court of appeals explained:

> *The arbitrator found that the additional slides were identical to other slides that Mao had created after becoming employed at Western Digital and that, if they had been prepared while Mao was at Seagate—as he claimed—they would not have had the Western Digital format. The arbitrator found that "Dr. Mao fabricated the ... presentations ... while he was working at Western Digital for the purposes of this litigation." The arbitrator further found that "[t]he fabrications were obvious" and that there "is no question that Western Digital had to know of the fabrications."*

Id. The arbitrator then determined that severe sanctions were warranted. *Id.* at 558-59. He precluded any evidence or defense by respondents to dispute the validity of Trade Secrets 4-6, and then entered a judgment of liability against both of them for misappropriating Trade Secrets 4-6. He also found a breach of the employment agreement by Mao.[69] On the sanctions-related trade secret claims, the arbitrator awarded Seagate $525 million in damages plus prejudgment interest of nearly $100 million and post-award interest of over $9 million. *Id.* at 559.

Seagate sought to confirm the award and respondents moved to vacate it. The trial court agreed with respondents but the court of appeals reversed. The court of appeals first held that respondents had waived an argument that the arbitrator exceeded his authority by imposing sanctions.[70] The court of appeals distinguished two Minnesota court decisions cited by respondents for the proposition that an objection to an arbitrator's authority did not have to take a particular form:

> *Neither of these cases can be construed to allow a party to completely fail to advise an arbitrator of objections to that arbitrator's authority, and then obtain a judicial determination of that authority. Although respondents may be correct that their objections need not take a particular form, they nevertheless must have made an objection on the particular grounds that they now seek to assert.*

Id. at 562.

Because respondents also sought sanctions from the arbitrator, they were also doomed in their challenge to the authority of the arbitrator:

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[69] Mao prevailed on all other of Seagate's trade secret claims and on the breach of fiduciary duty claim, and Western Digital prevailed on the Seagate's claim of tortious interference. 834 N.W.2d at 559.

[70] "The district court found that respondents had properly preserved the argument, and respondents argue that those findings are entitled to deference from this court, citing *Fedie v. Mid–Century Ins. Co.*, 631 N.W.2d 815, 819 (Minn.App.2001) (explaining that waiver of a contractual right to arbitrate is ordinarily a question of fact), *review denied* (Minn. Oct. 16, 2001). Assuming that the district court's determination that there was no waiver during the arbitration proceedings is a finding subject to deferential review, we conclude that the district court's finding in this regard was clearly erroneous. The portions of the record that respondents cite, and on which the district court relied, all contain arguments against imposition of sanctions on the merits; respondents provide no citation to a portion of the record in which they argued that the arbitrator did not have the authority to impose the requested sanctions for spoliation and fabrication of evidence. Accordingly, we conclude that the record does not support the district court's finding." 834 N.W.2d at 561.

> *The parties also dispute whether respondents themselves sought to invoke the arbitrator's authority to impose sanctions. Appellant argues that respondents' request for discovery sanctions fulfills this factor. Respondents do not dispute that they sought discovery sanctions, but assert that their request for "remedial" sanctions cannot be equated with appellant's request for "punitive" ones. We agree with appellant that there is no basis for such a distinction. Accordingly, we conclude that respondents did seek to invoke the very authority of the arbitrator that they now seek to challenge.*

Id.

The court of appeals could have stopped here, but "in the interests of justice" decided to address the question of whether the arbitrator exceeded his authority in imposing sanctions. The court of appeals acknowledged that the arbitration agreement was silent on the question of the arbitrator's authority to impose sanctions for bad-faith conduct. *Id.* at 563. But it looked to Minnesota precedent for the principle that arbitrators have inherent power to fashion remedies. It also cited precedent outside of Minnesota, including *ReliaStar*, *supra*, to support its conclusion:

> *With respect to fashioning remedies, however, our supreme court has held that "the power to fashion a remedy is a necessary part of the arbitrator's jurisdiction unless withdrawn from him by specific contractual language between the parties or by a written submission of issues which precludes the fashioning of a remedy." City of Bloomington v. Local 2828 of Am. Fed'n of State, County & Municipal Emp'es, 290 N.W.2d 598, 603 (Minn.1980); see also David Co. v. Jim W. Miller Const., Inc., 444 N.W.2d 836, 842 (Minn.1989) (explaining that such power is "implicit in the exceedingly broad powers which were granted by the parties" in a broadly worded arbitration agreement). The court has observed "a general trend of the courts, in the absence of limiting language in the contract itself, to accord judicial deference and afford flexibility to arbitrators to fashion awards comporting with the circumstances out of which the disputes arose." David Co., 444 N.W.2d at 841. The court has explained that recognizing such power in arbitrators is "entirely consistent with this court's long tradition of favoring the use of arbitration in dispute resolution and rejecting challenges to its employment, which, if granted, would limit, rather than expand, its utility." Id.*
>
> *We believe a similar analysis should be applied to determine whether an arbitrator has authority to impose sanctions. Accordingly, we find persuasive and adopt the reasoning of the courts that have found that a broadly worded arbitration agreement, with no limiting language to the contrary, "confers inherent authority on arbitrators to sanction a party that participates in the arbitration in bad faith." ReliaStar Life Ins. Co. of N.Y. v. EMC Nat'l Life Co., 564 F.3d 81, 86 (2nd Cir.2009); see also AmeriCredit Financial Servs., Inc. v. Oxford Mgmt. Servs., 627 F.Supp.2d 85, 96 (E.D.N.Y.2008) (holding that arbitrator had authority to dismiss claims as a sanction for the destruction of evidence, reasoning that "there is no language in the [agreement] that prevents an arbitrator from dismissing a claim on that basis").*

Id.

The AAA rules for employment disputes did not expressly authorize sanctions, the court of appeals acknowledged, but "they also do not limit the arbitrator's authority to impose sanctions." *Id.* Rule 39(d) of the Employment Arbitration Rules "broadly allows the arbitrator to 'grant any remedy or relief that would have been available to the parties had the matter been heard in court including awards of attorney's fees and costs, in accordance with applicable law.'" *Id.* There was no dispute that a court have awarded the same sanctions. *Id.* at 563-64.

Respondents' argument that the arbitrator had misapplied sanctions law fared no better. Calling them bedrock principles, the court of appeals held that the arbitrator was the final judge of the law and the facts and a court will not overturn an award merely because the court disagrees with the arbitrator's decision on the merits. *Id.* at 564-65.[71] The court of appeals also rejected a public policy challenge to the award.[72]

The Minnesota Supreme Court accepted respondents' appeal. The case was argued on February 5, 2014.[73] Presumably a decision will be rendered in the coming months.

The above case law discussion provides a helpful framework for rules governing sanctions or remedial measures in the rules of various institutions.[74]

Sanctions Under the AAA Commercial Arbitration Rules

On the domestic front, the AAA's 2013 Commercial Arbitration Rules now contain a rule entitled, "Sanctions." AAA Rule R-58 provides:

> *(a) The arbitrator may, upon a party's request, order appropriate sanctions where a party fails to comply with its obligations under these rules or with an order of the arbitrator. In the event that the arbitrator enters a sanction that limits any party's participation in the arbitration or results in an adverse determination of an issue or issues, the arbitrator shall explain that order in writing and shall require the submission of evidence and legal argument prior to making of an award. The arbitrator may not enter a default award as a sanction.*

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[71] Respondents did not show that the award was procured by fraud or corruption or that the arbitrator exhibited partiality, or that there was any other basis for ordering a new arbitration hearing. 834 N.W.2d at 566-67.

[72] "The district court's order suggests that the award is contrary to 'justice,' 'ascertainment of the truth,' and 'avoidance of surprise at trial.' Respondents assert that the award is contrary to the policy favoring disposal of cases on the merits. We conclude that these general assertions do not meet the requirement that a party identify a specific and dominant public policy that would be violated by confirming the arbitration award." 834 N.W.2d at 566.

[73] The oral argument can be viewed at http://www.tpt.org/courts/MNJudicialBranchvideo_2013.php?number=A129944.

[74] Statutes may also be applicable. Illustratively, Section 41 of the "Arbitration Act 1996" in the United Kingdom provides that "[u]nless otherwise agreed by the parties, the following provisions apply," and one of those provisions is Section 41(7) which allows for a number of sanctions: "If a party fails to comply with any other kind of peremptory order, then, without prejudice to section 42 (enforcement by court of tribunal's peremptory orders), the tribunal may do any of the following—(a) direct that the party in default shall not be entitled to rely upon any allegation or material which was the subject matter of the order; (b) draw such adverse inferences from the act of non-compliance as the circumstances justify; (c) proceed to an award on the basis of such materials as have been properly provided to it; (d) make such order as it thinks fit as to the payment of costs of the arbitration incurred in consequence of the non-compliance." The Florida Arbitration Act permits an arbitrator to "take action against a noncomplying party to the extent a court could if the controversy were the subject of a civil action" in Florida. § 682.08(4) Fla. Stat. Sanctions are permitted under the Florida Rules of Civil Procedure. See, e.g., Rule 1.380 ("Failure to Make Discovery; Sanctions") available at:

http://www.floridabar.org/TFB/TFBResources.nsf/0/10C69DF6FF15185085256B29004BF823/$FILE/Civil.pdf?OpenElement.

> *(b) The arbitrator must provide a party that is subject to a sanction request with the opportunity to respond prior to making any determination regarding the sanctions application.*

Several features of this rule are worth noting. First, there is no description of the type of sanction. Rather, they must be "appropriate." Presumably that means that the remedy should be tailored to the wrong—a corrective measure no greater than necessary to maintain fairness, professionalism, and civility.

On the other hand, a range of sanctions is contemplated by Rule R-58, up to but not including a default. An arbitrator can "limit" a party's "participation in the arbitration" but what is contemplated by this sanction is not clear. Does it mean that a boisterous party representative can be excluded from a hearing room? An arbitrator can also make an "adverse determination of an issue or issues." Normally such a determination would only follow from the loss of material evidence. If the loss is accidental, should a sanction be considered by an arbitrator?

We do not know the answers to these questions but we do know that before a participation-limiting or an issue-determinative sanction is issued, the arbitrator must first allow submission of evidence—presumably this means a written submission but this text would not exclude a hearing—and legal argument and must explain the basis for the sanction in written order. Does that mean for lesser sanctions, an arbitrator would not need to have a submission of evidence or legal argument? It probably does not mean this because Rule R-58(b) requires an arbitrator to provide an opportunity to respond to any party that is the subject of a sanction request.

It is not clear that an arbitrator may act *sua sponte* to sanction a party for violating an order. The first sentence of Rule R-58(a) uses the phrase "upon a party's request." Rule R-58(b) makes reference to a party "that is subject to a sanction request." It seems unlikely, however, that an arbitrator faced with sanction-warranting conduct by a party would eschew reacting because another party did not make a sanction request. Inherent authority to maintain the integrity of the process must exist as long as every party's right to be heard on the matter is preserved.

Second, the conduct must represent a failure to comply with an obligation under the rules. Presumably this refers to obligations other than payment obligations, since remedies for nonpayment of arbitration deposits are set forth in Rule R-57.

Alternatively, the conduct can represent the failure to comply with an order of an arbitrator. Given the control by arbitrators over the discovery process in arbitration, orders related to discovery are going to be issued and will likely become the focal point of this part of Rule R-58. Will violations of scheduling deadlines in an order become the subject of sanctions motions? One has to wonder, also, if arbitrants will start seeking preservation orders from arbitrators at the beginning of an arbitration and whether violations of such orders will become the topic of Rule R-58 sanctions' requests.

Rule R-58 uses the word "party." It does not use the word "attorney." What is an arbitrator to do with a disruptive lawyer for a party? Presumably, the arbitrator must sanction the party for the conduct of the party's lawyer, unless again inherent authority to preserve the integrity of the arbitration process can be relied upon to control the behavior of counsel.

If a lawyer's conduct amounts to a violation of the rules of professional conduct, referral to the Bar with jurisdiction over the lawyer's conduct is another option.

As noted earlier, Rule R-22(a) instructs arbitrators to "manage any necessary exchange of information" with "a view toward achieving an efficient and economical resolution of the dispute, while at the same time promoting equality of treatment and safeguarding each party's opportunity to fairly present is claims and defenses." Rule R-22(b)(i) allows arbitrators to require parties to exchange documents "in their possession or custody" on which they intend to rely. And under Rule R-22(b)(iii) and (iv) arbitrators can require parties to make available documents, including electronic documents, to the "other party" if certain conditions are met. Then, under Rule R-23, arbitrators "shall have the authority to issue any orders necessary to enforce" Rule 22 "and to otherwise achieve a fair, efficient and economically resolution of the case." Included among the arbitrator's enforcement options are Rule R-23(d) and (e): "(d) in the case of willful non-compliance with an order issued by the arbitrator, drawing adverse inferences, excluding evidence and other submissions, and/or making special allocations of costs or an interim award of costs arising from such non-compliance; and (e) issuing any other enforcement orders which the arbitrator is empowered to issue under applicable law." These remedies sound like "sanctions" based on the case law, but they do not appear in Rule R-58. Whatever the label, where AAA's commercial rules are applicable, they give the arbitrator the authority to take appropriate corrective measures with respect to document production misfeasance or malfeasance.

Sanctions Under the JAMS Commercial Arbitration Rules

JAMS Rule 29 is also entitled, "Sanctions." It provides in full:

> *The Arbitrator may order appropriate sanctions for failure of a Party to comply with its obligations under any of these Rules. These sanctions may include, but are not limited to, assessment of Arbitration fees and Arbitrator compensation and expenses; assessment of any other costs occasioned by the actionable conduct, including reasonable attorneys' fees; exclusion of certain evidence; drawing adverse inferences; or, in extreme cases, determining an issue or issues submitted to Arbitration adversely to the Party that has failed to comply.*

Unlike the AAA's rules, JAMS' Rule 1 provides that the word "Party" includes "counsel or representatives" of the party. On the other hand, JAMS' Rule 29 does not address violations of an arbitrator's order. To the extent that compliance with an arbitrator's order is an obligation under the JAMS rules, the omission is not material.[75]

The JAMS rules do provide a list of potential sanctions. They add assessment of arbitration fees and costs and assessment of a party's costs and attorneys' fees to the AAA's list of sanctions in AAA Rule R-58.

The JAMS rules say nothing about submission of evidence or legal argument or the requirement of a written order explaining the basis of a sanction. A prudent arbitrator would, however, not view this omission as a license to ignore a party's right to be heard or the possibility of judicial review of the arbitrator's actions. One would expect, therefore, a reasoned explanation for any sanctions decision after an opportunity was given to a party to explain its conduct.

[75] There is not an explicit statement in the JAMS rules that a party comply with an arbitrator's order but taken as whole the JAMS rules should be read to require such compliance.

JAMS' Rule 29 does not preclude entry of a default against an arbitrant. It is silent on the subject but the text of Rule 29 would allow this sanction if the words "may include, but are not limited to" are given a literal meaning.

Sanctions Under CPR's Commercial Arbitration Rules

CPR's Rule 16 is entitled, "Failure to Comply with Administered Rules." Unlike the AAA's and JAM's sanctions rules, CPR's Rule 16 specifically allows for a default. Like AAA's Rule R-58, it also provides for a "remedy" for failure to comply with an order of a tribunal. Rule 16 provides:

> *Whenever a party fails to comply with these Administered Rules, or any order of the Tribunal pursuant to these Administered Rules, in a manner deemed material by the Tribunal, the Tribunal, if appropriate, shall fix a reasonable period of time for compliance and, if the party does not comply within said period, the Tribunal may impose a remedy it deems just, including an award on default. Prior to entering an award on default, the Tribunal shall require the non-defaulting party to produce evidence and legal argument in support of its contentions as the Tribunal may deem appropriate. The Tribunal may receive such evidence and argument without the defaulting party's presence or participation.*

Whereas AAA's Rule R-58 specifically provides for submission of evidence and legal argument in the case of participation-limiting or issue-determinative sanctions, CPR's Rule 16 provides for such process only before a tribunal considers an award on default of a party. Rule 16 also provides for a "cure" period and further requires that a failure to comply with either rules or an order must be "material." Presumably, "material" refers to the merits of the matter and the integrity of the process. Rule 16 also does not list types of "remedies," preferring instead limit arbitrators to imposition of a "just" remedy.

Article 21.7 of the ICDR Rules

Internationally, the ICDR's International Dispute Resolution Procedures effective June 1, 2014[76] do not contain a sanctions provision like its AAA counterpart. However Article 21.7 does give the arbitration tribunal some leeway to address inappropriate conduct. It provides:

> *The parties shall make every effort to avoid unnecessary delay and expense in the arbitration. The arbitral tribunal may allocate costs, draw adverse inferences, and take such additional steps as are necessary to protect the efficiency and integrity of the arbitration.*

Article 22 of the ICC Rules

ICC Article 22 is entitled, "Conduct of the Arbitration." It does not address sanctions. It contains a number of aspirational goals and where orders are entered provides that parties "undertake" to comply with them. Article 22 provides:

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[76] https://www.adr.org/aaa/faces/rules/searchrules/rulesdetail?doc=ADRSTAGE2020422&_afrLoop=563099517852003&_afrWindowMode=0&_afrWindowId=gjc03r662_349#%40%3F_afrWindowId%3Dgjc03r662_349%26_afrLoop%3D563099517852003%26doc%3DADRSTAGE2020422%26_afrWindowMode%3D0%26_adf.ctrl-state%3Dgjc03r662_409.

1) The arbitral tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute.

2) In order to ensure effective case management, the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties.

3) Upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information.

4) In all cases, the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.

5) The parties undertake to comply with any order made by the arbitral tribunal.

Article 14 of the LCIA Rules and Proposed General Guidelines for Counsel

The current LCIA rules also do not address the power of a tribunal to sanction objectionable conduct. LCIA Article 14 addresses the "Conduct of the Proceedings" and admonishes the *tribunal* to avoid unnecessary delay or expense in a proceeding while admonishing parties to "do everything necessary for the fair, efficient and expeditious" conduct of the arbitration. Articles 14.1 and 14.2 provide:

14.1. The parties may agree on the conduct of their arbitral proceedings and they are encouraged to do so, consistent with the Arbitral Tribunal's general duties at all times:

(i) to act fairly and impartially as between all parties, giving each a reasonable opportunity of putting its case and dealing with that of its opponent; and

(ii) to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay or expense, so as to provide a fair and efficient means for the final resolution of the parties' dispute.

Such agreements shall be made by the parties in writing or recorded in writing by the Arbitral Tribunal at the request of and with the authority of the parties

14.2. Unless otherwise agreed by the parties under Article 14.1, the Arbitral Tribunal shall have the widest discretion to discharge its duties allowed under such law(s) or rules of law as the Arbitral Tribunal may determine to be applicable; and at all times the parties shall do everything necessary for the fair, efficient and expeditious conduct of the arbitration.

The LCIA currently has under review proposed Articles 18.5 and 18.6 that would, for the first time, create avenues for a tribunal to address certain conduct of a party or its legal representatives. Proposed Article 18.5 would require a party to ensure that its legal representatives comply with "general guidelines" contained in an annex to the LCIA Rules "as a condition of appearing by name" before the tribunal. Proposed Article 18.6 addresses complaints against a party's legal representative by another party or at the initiative of the tribunal. The tribunal "may decide (after consulting the parties and granting that legal representative a reasonable

opportunity to answer the complaint) whether or not the legal representative has violated the general guidelines." Assuming this discretion is exercised and a violation is found the tribunal then "may order any or all of the following sanctions against the legal representative: a written reprimand; a written caution as to future conduct in the arbitration; [a reference to the legal representative's regulatory and or professional body]; and any other measure necessary to maintain the general duties of the Arbitral Tribunal under Article 14.4(i) and (ii)."

The general guidelines contained in the proposed Annex to the LCIA Rules are still under review. Nonetheless, the February 18, 2014, version of the proposed Annex is illuminating for the insights it provides into conduct from which international arbitration is not immune. In reading these draft guidelines, note the due regard for the duty of loyalty to a client and fealty to the parties' arbitration agreement but the need to expressly reject obstructionist conduct, lying, fraud, concealment, and unilateral contacts with the tribunal:

> *ANNEX TO THE LCIA RULES*
> *General Guidelines for the Parties' Legal Representatives (Articles 18.5 and 18.6 of the LCIA Rules)*
>
> *Paragraph 1: These general guidelines are intended to promote generally the good and equal conduct of the parties' legal representatives appearing by name within the arbitration proceedings. Nothing in these guidelines is intended to derogate from the Arbitration Agreement or to undermine any legal representative's primary duty of loyalty to the party represented in the arbitration or the obligation to present that party's case effectively to the Arbitral Tribunal. Nor shall these guidelines derogate from any mandatory laws, rules of law, professional rules or codes of conduct if and to the extent that any are shown to apply to a legal representative appearing in the arbitration.*
>
> *Paragraph 2: A legal representative should not engage in activities intended unfairly to obstruct the arbitration or to jeopardise the finality of any award, including repeated challenges to an arbitrator's appointment or to the Arbitral Tribunal's jurisdiction or authority known to be unfounded by that legal representative.*
>
> *Paragraph 3: A legal representative should not knowingly make any false statement to the Arbitral Tribunal or the LCIA Court.*
>
> *Paragraph 4: A legal representative should not knowingly procure or assist in the preparation of or rely upon any false evidence presented to the Arbitral Tribunal or the LCIA Court.*
>
> *Paragraph 5: A legal representative should not knowingly conceal or assist in the concealment of any document (or any part thereof) which is ordered to be produced by the Arbitral Tribunal.*
>
> *Paragraph 6: During the arbitration proceedings, a legal representative should not deliberately initiate or attempt to initiate with any member of the Arbitral Tribunal or with any member of the LCIA Court (making any determination or decision in regard to the arbitration) any unilateral contact relating to the arbitration or the parties' dispute, which has not been not disclosed in writing prior to or shortly after the time of such contact to all*

other parties, all members of the Arbitral Tribunal (if comprised of more than one arbitrator) and (where appropriate) the Registrar in accordance with Article 13.4.

Paragraph 7: In accordance with Articles 18.5 and 18.6, the Arbitral Tribunal may decide whether a legal representative has violated these general guidelines and, if so, how to exercise its discretion to impose any or all of the sanctions listed in Article 18.6.

What conclusions should one draw from this limited journey into the world of sanctions in domestic and international arbitration? If you really want to have sanctions authority, put it in the arbitration clause. That may not be easy, of course. It would appear unseemly to start a business relationship with an arbitration clause that anticipates one side behaving badly. Something rather bland might still work ("the arbitrator shall have authority to address any disputes that arise during the conduct of the arbitration" might be sufficient).[77] Yet another course is to focus on jurisdiction's case law on the topic or the scope of the rules of the administering institution. Either the jurisprudence or the rules may provide sufficient authority to impose sanctions where appropriate without a party having to say anything specific in the arbitration agreement.

DO ETHICS RULES APPLY IN INTERNATIONAL ARBITRATION? WILL THE IBA GUIDELINES ON PARTY REPRESENTATION BECOME A GAME CHANGER?

There is no question that a United States lawyer whose conduct is regulated by a State Bar is bound by the rules of professional conduct of that State Bar where he or she is participating in a domestic or international arbitration. That part of the question is easy.

But what if lawyers opposing your client in an international arbitration are not bound to rules of professional conduct? Then what? Proposed LCIA Rules 18.5 and 18.6 and the general guidelines in the proposed Annex to the LCIA Rules provide one answer: arbitral institutions can fill the void to ensure that all lawyers are playing by appropriate rules of professional conduct.

The International Bar Association has also entered this arena. Trading on its very successful IBA Rules for the Taking of Evidence in International Arbitration,[78] the IBA promulgated in 2013 the IBA Guidelines on Party Representation.[79] It remains to be seen whether these guidelines are written into arbitration agreements or whether tribunals urge parties, or vice versa, to adopt them to govern conduct once an arbitration has been commenced.

Let's explore the Guidelines. In doing so, ask yourself whether you would accept the Guidelines in whole or in part if proposed for adoption in an arbitration agreement or a preliminary order.

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[77] For an alternative see *Metropolitan District Commission v. Connecticut Resources Recovery Authority*, 22 A.3d 651, 656, n.2 (Conn. App. 2011). This case involved a dispute over party-appointed arbitrators, but in the course of the opinion, the appellate court quoted a portion of the arbitration clause that contained sanctioning authority: "The arbitrators shall use all reasonable means to expedite discovery and to sanction noncompliance with reasonable discovery requests or any discovery order."

[78] They can be found at this link: http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

[79] http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCgQFjAA&url=http%3A%2F%2Fwww.ibanet.org%2FDocument%2FDefault.aspx%3FDocumentUid%3D6F0C57D7-E7A0-43AF-B76E-714D9FE74D7F&ei=v2ODU8KiO8SMqAa1-4KoCQ&usg=AFQjCNGapAFX_Svb7UzJpx0EX_XySwp5zQ&bvm=bv.67720277,d.b2k.

We begin at the beginning. Guideline 1 provides:

> *The Guidelines shall apply where and to the extent that the Parties have so agreed, or the Arbitral Tribunal, after consultation with the Parties' wishes to rely upon them after having determined that it has the authority to rule on matters of Party representation to ensure the integrity and fairness of the arbitral proceedings.*

Careful readers will see the distinction between an agreement and an order implementing the Guidelines. In the former case, they are applicable. In the latter case, the tribunal must first determine that it has authority to rule on matters of party representation to ensure integrity and fairness. That will require an evaluation of applicable law.[80]

Guideline 3 recognizes the primary role played by rules of professional conduct and defers both to the arbitration agreement and a party representative's duty of loyalty.

> *The Guidelines are not intended to displace otherwise applicable mandatory laws, professional or disciplinary rules, or agreed arbitration rules, in matters of Party representation. The Guidelines are also not intended to derogate from the arbitration agreement or to undermine either a Party representative's primary duty of loyalty to the party whom he or she represents or a Party representative's paramount obligation to present such Party's case to the Arbitral Tribunal.*

To address the topic of a party's retention of a lawyer that would create a conflict of interest on the part of a member of a tribunal, Guideline 5 provides that once a tribunal has been constituted, a person "should not accept representation of a Party in the arbitration when a relationship exists between the person and an Arbitrator that would create a conflict of interest, unless none of the Parties objects after proper disclosure." Guideline 5 is awkward in its structure. If the Guidelines are adopted in an agreement or an order, they do not bind a person until the person accepts representation. And disclosure would not have to occur if the person "should not accept" representation. Presumably, the point here is that a party bound by the Guidelines should not seek to enlist a lawyer whose engagement would create the conflict unless the party first communicates with the tribunal and other parties to determine if there is an objection after "proper disclosure."

Anticipating that awkwardness perhaps, Guideline 6 gives the tribunal the power to exclude the new "party representative"[81] from participation in the proceedings: "6. The Arbitral Tribunal may, in case of breach of

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[80] Hence, whether a jurisdiction gives such authority to a tribunal may become a new checklist item in evaluating arbitral venues or choice of law.

[81] The Guidelines define "Party Representative" as "any person, including a Party's employee, who appears in an arbitration on behalf of a Party and makes submissions, arguments or representations to the Arbitral Tribunal on behalf of such Party, other than in the capacity as a Witness or Expert, and whether or not legally qualified or admitted to a Domestic Bar."

Guideline 5, take measures appropriate to safeguard the integrity of the proceedings, including the exclusion of the new Party Representative from participating in all or part of the arbitral proceedings."[82]

Guideline 8 accepts the propriety of *ex parte* contacts with prospective arbitrators relating to expertise, availability, experience, and potential conflicts of interest. It would not have complete application unless the Guidelines were made a part of an arbitration agreement, and, in all circumstances, would prohibit discussions on the substance of a dispute:

> *8. It is not improper for a Party Representative to have Ex Parte Communications in the following circumstances:*
>
> *(a) A Party Representative may communicate with a prospective Party-Nominated Arbitrator to determine his or her expertise, experience, ability, availability, willingness and the existence of potential conflicts of interest.*
>
> *(b) A Party Representative may communicate with a prospective or appointed Party-Nominated Arbitrator for the purpose of the selection of the Presiding Arbitrator.*
>
> *(c) A Party Representative may, if the Parties are in agreement that such a communication is permissible, communicate with a prospective Presiding Arbitrator to determine his or her expertise, experience, ability, availability, willingness and the existence of potential conflicts of interest.*
>
> *(d) While communications with a prospective Party-Nominated Arbitrator or Presiding Arbitrator may include a general description of the dispute, a Party Representative should not seek the views of the prospective Party-Nominated Arbitrator or Presiding Arbitrator on the substance of the dispute.*

Candor to the tribunal[83] is a hallmark of any ethics code for lawyers.[84] "Knowingly"[85] allowing false submissions of fact or evidence before a tribunal is prohibited by Guideline 9 and, in Guidelines 10-11,

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[82] Cf. *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia,* ICSID Case No. ARB/05/24 (May 6, 2008). https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC950_En&caseId=C69. Shortly before a hearing on the merits, Respondent announced the involvement of additional counsel, a barrister from the same chambers as the President of the tribunal. Claimant objected arguing that the late addition jeopardized the fairness of the proceeding by creating an appearance of impropriety. The tribunal held that the barrister could not participate as "further counsel in the case." "[A]lthough the Respondent in this case was free to select its legal team as it saw fit prior to the constitution of the Tribunal, it was not entitled to subsequently amend the composition of its legal team in such a fashion as to imperil the Tribunal's status or legitimacy." Opinion at p. 10. The tribunal also determined that it had inherent authority to protect the integrity of the process: "The Tribunal disagrees with the contention of Respondent that it has no inherent powers in this regard. It considers that as a judicial formation governed by public international law, the Tribunal has an inherent power to take measures to preserve the integrity of its proceedings. In part, that inherent power finds a textual foothold in Article 44 of the Convention, which authorizes the Tribunal to decide 'any question of procedure, not expressly dealt with in the Convention, the ICSID Arbitration Rules or 'any rule agreed by the parties'. More broadly, there is an 'inherent power of an international court to deal with any issues necessary for the conduct of matters falling within its jurisdiction'; that power 'exists independently of any statutory reference'. In the specific circumstances of the present case, it is in the Tribunal's view both necessary and appropriate to take action under its inherent power." Opinion at p. 13-14.

[83] Under the Model Rules of Professional Conduct, a "tribunal" is broadly defined in Rule 1.0(m): "'Tribunal' denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter."

remedial measures, including withdrawal from the representation, are required of "party representatives"[86] who "know" or "later discover" that false evidence was presented to the tribunal.

> *9. A Party Representative should not make any knowingly false submission of fact to the Arbitral Tribunal.*
>
> *10. In the event that a Party Representative learns that he or she previously made a false submission of fact to the Arbitral Tribunal, the Party Representative should, subject to countervailing considerations of confidentiality and privilege, promptly correct such submission.*
>
> *11. A Party Representative should not submit Witness or Expert evidence that he or she knows to be false. If a Witness or Expert intends to present or presents evidence that a Party Representative knows or later discovers to be false, such Party Representative should promptly advise the Party whom he or she represents of the necessity of taking remedial measures and of the consequences of failing to do so. Depending upon the circumstances, and subject to countervailing considerations of confidentiality and privilege, the Party Representative should promptly take remedial measures, which may include one or more of the following:*
>
> *(a) advise the Witness or Expert to testify truthfully;*
>
> *(b) take reasonable steps to deter the Witness or Expert from submitting false evidence;*
>
> *(c) urge the Witness or Expert to correct or withdraw the false evidence;*
>
> *(d) correct or withdraw the false evidence;*
>
> *(e) withdraw as Party Representative if the circumstances so warrant.*

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[84] Model Rule 3.3 is entitled "Candor Toward the Tribunal." It provides in pertinent part:

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

[85] The Guidelines define "knowingly" as meaning "with actual knowledge of the fact in question."

[86] While "Party Representative" is defined to include persons other than lawyers, I discuss the term as if it means "lawyer," since I believe parties in international arbitration are almost always represented by lawyers.

Guideline 10 provides that "confidentiality and privilege" might be used to preclude or prevent the correction of a "false submission of fact" by a lawyer who learns after-the-fact of the false submission. United States lawyers governed by the Model Rules of Professional Conduct will recognize that the caveat is inconsistent with Model Rules 3.3(c), which provides that the duty of candor to the tribunal continues "to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6." Rule 1.6 contains the obligations of lawyers to protect the confidentiality of client information. In other words, under the Model Rules, the duty of candor trumps the duty of confidentiality.

The IBA Rules on Party Representation also tackled the thorny issues associated with document preservation and production. In the United States, and in many common law jurisdictions, there is a duty to preserve information relevant to a claim or a defense after litigation has been commenced or when litigation is reasonably anticipated. Violations of the duty to preserve usually are addressed through motions for sanctions under either Fed. R. Civ. Procedure 37 or a court's inherent authority.

In domestic arbitration, as discussed above, sanctions motions are not easily brought. In domestic arbitration, the issue of the loss of information is usually handled at a hearing or in the drafting of an award where missing evidence can result in an adverse inference drawn against the party in control of the evidence. In international arbitration, the process is the same except that there may not be a duty to preserve even recognized in many countries where an arbitrant, or some of the arbitrants, may be domiciled.

Against this backdrop, Guideline 12 states when the arbitral proceedings "involve or are likely to involve Document production, a Party Representative should inform the client of the need to preserve, so far as reasonably possible, Documents, including electronic Documents that would otherwise be deleted in accordance with a Document retention policy or in the ordinary course of business, which are potentially relevant to the arbitration." This guideline is noteworthy in several respects:

1. It would be the rare international arbitration which does not involve some document production.
2. Informing the client is not made mandatory. "Should inform" suggests it would be a prudent practice, not that it must be done.
3. If preservation advice is provided by the party representative, it need reach only "so far as reasonably possible." Is what is reasonable in the eyes of the beholder? That is not clear.
4. Documents include electronic documents that would otherwise be deleted. Does this text refer also to backup media that are overwritten periodically? That is not clear.
5. "Potentially relevant to the arbitration" raises a question that parties on different sides of an issue might differ.
6. If this guideline is embodied in a tribunal's order, what would happen if the party representative is a lawyer, the lawyer does not inform the client to preserve, or gives the advice but the party decides that what is reasonably possible is limited, or that information that is not preserved is not potentially relevant?
7. Does a privilege attach to the advice given by the lawyer to the party on document preservation? Would a tribunal permit "discovery on discovery" to find out if there was compliance with Guideline 12?

One can see that the imprecision of Guideline 12 raises a genuine risk of satellite disputes over preservation advice.

Guideline 13 addresses requests for production or objections to such requests. Lawyers are told they should not use either for an improper purpose: "A Party Representative should not make any Request to Produce, or

any objection to a Request to Produce, for an improper purpose, such as to harass or cause unnecessary delay."[87]

Guideline 14 focuses a lawyer on explaining the necessity of producing documents that a party has undertaken to produce or been ordered to produce or the consequences of not doing so. Guideline 14 provides in full: "A Party Representative should explain to the Party whom he or she represents the necessity of producing, and potential consequences of failing to produce, any Document that the Party or Parties have undertaken, or been ordered, to produce."

Guideline 15 emphasizes the importance of taking reasonable steps to find responsive documents:

> *A Party Representative should advise the Party whom he or she represents to take, and assist such Party in taking, reasonable steps to ensure that: (i) a reasonable search is made for Documents that a Party has undertaken, or been ordered, to produce; and (ii) all non-privileged, responsive Documents are produced.*

Guideline 16 focuses on the honesty of lawyers to produce documents requested by another party or that a party is undertaking to produce or has been ordered to produce: "A Party Representative should not suppress or conceal, or advise a Party to suppress or conceal, Documents that have been requested by another Party or that the Party whom he or she represents has undertaken, or been ordered, to produce."[88] What a party decides to do on its own is not referenced in this guideline.

Guideline 17 is the final guideline on "information exchange and disclosure." It tells a lawyer in an international arbitration what to do if a lawyer learns of the existence of a document that should have been produced and was not.

> *If, during the course of an arbitration, a Party Representative becomes aware of the existence of a Document that should have been produced, but was not produced, such Party Representative should advise the Party whom he or she represents of the necessity of producing the Document and the consequences of failing to do so.*

Guidelines 18-25 address "Witness and Experts." Guidelines 19 and 20 are analogs to guidelines United States courts have issued under Model Rule 4.2 that prevents *ex parte* contacts with a represented person.[89] Guideline 18 requires a lawyer who makes contact with a witness or expert to explain the lawyer's role and interest: "Before seeking any information from a potential Witness or Expert, a Party Representative should identify himself or herself, as well as the Party he or she represents, and the reason for which the information is

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[87] Domestic litigants will recognized that this text is consistent with Fed. R. Civ. Procedure 26(g), which provides in pertinent part that by signing a document request or response, an attorney certifies "that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry: … (B) with respect to a discovery request, response, or objection, it is: …(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;…"

[88] Model Rule 3.4(a) is analogous: "A lawyer shall not: (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;…"

[89] Model Rule 4.2 provides in full: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." See generally Barkett, J., *Ex Parte Contacts with Former Employees,* (ABA Section of Litigation's Monograph, October 2002).

sought."[90] Guideline 19 addresses what a lawyer should do if the witness is represented. The inferred predicate here is that the lawyer will inquire whether the witness is represented.[91] Guideline 19 provides: "A Party Representative should make any potential Witness aware that he or she has the right to inform or instruct his or her own counsel about the contact and to discontinue the communication with the Party Representative."

In civil law countries, assisting a witness or an expert in the preparation of witness statements or a report is not common in litigation. Guideline 20 makes it plain that this conduct is permissible[92] with the admonition in Guideline 21 that, "A Party Representative should seek to ensure that a Witness Statement reflects the Witness's own account of relevant facts, events and circumstances," and in Guideline 22 that, "A Party Representative should seek to ensure that an Expert Report reflects the Expert's own analysis and opinion." Consistent with these admonitions, Guideline 24 also establishes that it is all right for a lawyer to "meet or interact with Witnesses and Experts in order to discuss and prepare their prospective testimony"—again a reminder to lawyers in jurisdictions who may not engage in this practice in litigation.

Guideline 23, hopefully, is an obvious rule of professional conduct: "A Party Representative should not invite or encourage a Witness to give false evidence."[93]

Guideline 25 addresses payments to witnesses. It is consistent with rules of professional conduct in the United States.[94] It provides in full:

> *25. A Party Representative may pay, offer to pay, or acquiesce in the payment of:*
>
> *(a) expenses reasonably incurred by a Witness or Expert in preparing to testify or testifying at a hearing;*
>
> *(b) reasonable compensation for the loss of time incurred by a Witness in testifying and preparing to testify; and*
>
> *(c) reasonable fees for the professional services of a Party-appointed Expert.*

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[90] Cf. Model Rule 4.3 which provides in full: "In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client."

[91] Cf. Comment 8 to Model Rule 4.2: "[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious." Rule 1.0(f) provides: "'Knowingly,' 'known,' or 'knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances."

[92] Guideline 20 provides in full: "A Party Representative may assist Witnesses in the preparation of Witness Statements and Experts in the preparation of Expert Reports."

[93] Compare Model 3.4(b) which provides in pertinent part: "A lawyer shall not:…falsify evidence, counsel or assist a witness to testify falsely,…"

[94] Model Rule 3.4(b) provides in pertinent part that a lawyer shall not "offer an inducement to a witness that is prohibited by law." The Model Rules prohibit payment for testimony but allow reasonable compensation for expenses and lost wages. See generally, Barkett, J., *Cheap Talk? Witness Payments and Conferring with Testify Witnesses*, (ABA Annual Meeting, Chicago, 2009).

The final two guidelines address remedies for "misconduct." Misconduct is defined in the IBA Guidelines on Party Representation to mean "a breach of the present Guidelines or any other conduct that the Arbitral Tribunal determines to be contrary to the duties of a Party Representative." Guideline 26 does not permit imposition of a remedial measure without first giving parties[95] notice and a reasonable opportunity to be heard. Guideline 26 provides:

> *26. If the Arbitral Tribunal, after giving the Parties notice and a reasonable opportunity to be heard, finds that a Party Representative has committed Misconduct, the Arbitral Tribunal, as appropriate, may:*
>
> *(a) admonish the Party Representative;*
>
> *(b) draw appropriate inferences in assessing the evidence relied upon, or the legal arguments advanced by, the Party Representative;*
>
> *(c) consider the Party Representative's Misconduct in apportioning the costs of the arbitration, indicating, if appropriate, how and in what amount the Party Representative's Misconduct leads the Tribunal to a different apportionment of costs;*
>
> *(d) take any other appropriate measure in order to preserve the fairness and integrity of the proceedings.*

The first and third remedies are employed now by tribunals without the need for the Guidelines.[96]

Drawing an appropriate inference with respect to evidence or legal argument of a party representative is allowed as a result of misconduct generally. At least with respect to evidence, it would seem more appropriate to link the inference to the failure to produce relevant, nonduplicative information in the possession of a producing party.[97] Because of the breadth of this remedial measure and the breadth of the definition of "misconduct," it would not be surprising to see this part of Guideline 26 generating satellite disputes.

The last remedy, "any other appropriate measure" to preserve "fairness and integrity," will receive the most attention from lawyers and tribunals where the Guidelines apply. It seems clear that the remedy should be tailored to the wrong and be no more severe than necessary to preserve fairness and integrity. But beyond this statement, one can expect that lawyers will not be shy in identifying what they think is "appropriate" to punish "misconduct."

But that's where Rule 27 comes into play. Tribunals are cautioned to be wary and thoughtful in addressing issues of misconduct. It provides:

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[95] The Guidelines define "Party" as "a party to the arbitration." "Party" does not include a "Party Representative."

[96] Article 9(7) of the IBA Rules on the Taking of Evidence in International Arbitration already provide for reallocation of costs for a lack of good faith conduct: "If the Arbitral Tribunal determines that a Party has failed to conduct itself in good faith in the taking of evidence, the Arbitral Tribunal may, in addition to any other measures available under these Rules, take such failure into account in its assignment of the costs of the arbitration, including costs arising out of or in connection with the taking of evidence."

[97] Article 9(5) of The IBA Rules on the Taking of Evidence in International Arbitration already permit adverse inferences to be drawn by a tribunal in the case of a failure to produce a document: "If a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party."

27. In addressing issues of Misconduct, the Arbitral Tribunal should take into account:

(a) the need to preserve the integrity and fairness of the arbitral proceedings and the enforceability of the award;

(b) the potential impact of a ruling regarding Misconduct on the rights of the Parties;

(c) the nature and gravity of the Misconduct, including the extent to which the misconduct affects the conduct of the proceedings;

(d) the good faith of the Party Representative;

(e) relevant considerations of privilege and confidentiality; and

(f) the extent to which the Party represented by the Party Representative knew of, condoned, directed, or participated in, the Misconduct.

Tribunals will be well-advised to make a comprehensive record of misconduct before imposing a remedial measure that might generate a claim that a party was not afforded due process. Similarly, that record should be on display in any order on remedial measures that a tribunal might enter. By the same token, tribunals need to be sensitive to baseless claims of misconduct.

WHAT ARE THE BEST WAYS TO CONTROL THE COST OF ARBITRATION WITHOUT COMPROMISING THE FAIRNESS OF THE PROCESS?

Users or potential users of arbitration frequently complain about the cost of arbitration. One refrain one sometimes hears is, "Arbitration is no cheaper than litigation and there is no right to appeal."

Just as the key to cost-effective litigation is an engaged judge who runs a tight ship focused on getting to a fair outcome at a reasonable cost, the key to cost control in arbitration is the arbitrator or the arbitration panel. Good arbitrators will work with the parties to get to a hearing and an award at a reasonable cost.

In 2012, the International Chamber of Commerce published the report of an ICC Commission on "Controlling Time and Costs in Arbitration."[98] The report is focused on ICC arbitrations but many of the findings apply to any arbitration. The table below lists topics identified in the report and ways that costs may be reduced within each topic, drawn from the report and my personal experiences.

Topic	Considerations for Cost Reduction or Control
Selection of Counsel	• Select counsel with experience who have the time necessary to move the arbitration along.
Selection of arbitrators	• Use a sole arbitrator. • Select arbitrators who have the time to devote to the matter.

[98] The report can be found at http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2012/ICC-Arbitration-Commission-Report-on-Techniques-for-Controlling-Time-and-Costs-in-Arbitration/.

Topic	Considerations for Cost Reduction or Control
	• Select arbitrators with strong case management skills. • Use a selection system that minimizes objections.
Statement of Claim and Answer	• Set out a detailed statement of the case and a detailed answer in response. • If the arbitration is proceeding under published rules, compliance with the rules by all parties will bring down costs.
Procedural and preliminary issues	• In a three-member tribunal, empower the chair of the tribunal to make rulings on procedural issues. • Utilize electronic means of communication and telephone or video conferencing in lieu of physical meetings.
Case Management Conferences	• Time them smartly with a clear and timely agenda to ensure all parties are prepared and to make the best use of everyone's time. Evaluate whether clients need to participate. Having them participate may save the parties costs in the long run. • Evaluate the need for a physical meeting. • Utilize the tribunal's authority to apportion costs to encourage reasonable and timely conduct.
Timetable	• Determine whether a hearing will be necessary on every issue in a matter. • Once a hearing timetable is set, stick to it. Delay costs everyone more. • But establish realistic time periods. • Consider whether bifurcation of liability and damages/quantum makes sense. • Consider motions for summary disposition or partial awards that might facilitate settlements. • Consider building in a settlement window for the parties before large arbitration expenses are incurred but at an opportune time in the process to improve the chances of success.
Written Submissions	• Establish reasonable page limits • Minimize or eliminate repetition. • Control the number of submissions. • Stay on schedule in making submissions.
Documentary Evidence	• Require production of documents on which parties rely. • Establish procedures for requests for documents and then follow/enforce them. • Manage request for production efficiently. • Address disputes in their incipiency. • Keep hard copies to a minimum. • Obtain stipulations on authenticity of documents. • Have a sensible identification system for documents and avoid duplication wherever possible. • Address procedures for translations of documents.
Correspondence	• Establish ground rules for correspondence with the tribunal. • Maintain civility in correspondence between counsel.

Topic	Considerations for Cost Reduction or Control
Witness Statements	• Evaluate the number of witnesses and limit witnesses to avoid duplication or redundancy. • Minimize the number of rounds of witness statements.
Expert Witnesses	• Evaluate whether expert evidence is needed • Decide whether there should be a limit on the number of experts. • Make the expert report the expert's direct testimony. • Consider meetings of experts to identify areas of agreement and crystalize areas of disagreement. • Control the number of expert reports.
Hearings	• Identify a location that is least expensive for the parties yet convenient. • Minimize the number of hearings through smart scheduling and good organization. • Control the length of hearings. Use a "chess clock" where each side gets a certain amount of time to present its direct case and exercise cross-examination rights. • Keep hearing submissions on schedule with ample time for everyone to review them. • Establish a cut-off date for evidence that is going to be submitted. • Use telephone and video conferencing for hearings, or for a particular witness, where practical and sensible. • Stipulate to core documents and avoid repetition in submission of exhibits. • Use witness statements as the direct examination of a fact witness and move right to cross examination. • Control or limit cross examination to the issues raised by the witness. • Evaluate the need for closing submissions.
Awards	• Anticipate fairly the time needed for deliberations and preparations of an award. • Complete awards promptly. • Evaluating the level of detail or analysis required in an award.

Arbitrators can also use allocation of costs to encourage efficiency in the conduct of proceedings and to control inappropriate conduct. Parties and tribunals will have to adapt best practices to multi-party or multi-contract arbitrations. Consolidation of related cases, for example, may make sense. Emergency arbitrator proceedings or requests for interim measures have to be handled prudently to keep costs proportional to the matters in controversy.

The list above is not intended to be exhaustive. Creative parties can find ways to reduce costs. Parties who stay on schedule and follow procedures correctly the first time will save money. Arbitrators who manage cases firmly but fairly will also.

CONCLUSION

Arbitration is here to stay. However, it is not without its critics. The limited scope of review of arbitration awards means it is imperative that arbitration maintain legitimacy at all costs. That may mean affording appellate arbitral review, adoption of ethics rules, or enforcement of sanctions authority. It will mean ensuring the selection of able, honest, diligent arbitrators who know how to conduct a cost-effective arbitration without compromising fairness. It will also mean thoughtful drafting of arbitration agreements.

Hot questions have cool answers when all stakeholders are vigilant in promoting everything that is good in arbitration, while recognizing everything that requires improvement--and then acting on smart initiatives to improve the speed and reduce the cost of arbitration without sacrificing fairness. The goals are clear. The will to implement them—complacency is dangerous—remains the challenge all of us devoted to maintaining the legitimacy of arbitration must accept.

ABOUT THE AUTHOR

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Mr. Barkett is a partner at the law firm of Shook, Hardy & Bacon L.L.P. in its Miami office. He is a graduate of the University of Notre Dame (B.A. Government, 1972, *summa cum laude)* and the Yale Law School (J.D. 1975) and served as a law clerk to the Honorable David W. Dyer on the old Fifth Circuit Court of Appeals. Mr. Barkett is an adjunct professor of law at the University of Miami School of Law. He is also the recipient of one of the 2011 Burton Awards for Legal Achievement which honors lawyers for distinguished legal writing. In March 2012, the Chief Justice appointed Mr. Barkett to serve on the Advisory Committee for Civil Rules of the Federal Judicial Conference.

Mr. Barkett has, over the years, been a commercial litigator (contract and corporate disputes, employment, trademark, and antitrust), environmental litigator (CERCLA, RCRA, and toxic tort), and, for the past several years, a peacemaker and problem solver, serving as an arbitrator, mediator, facilitator, or allocator in a variety of environmental, commercial, or reinsurance contexts. He is a certified mediator under the rules of the Supreme Court of Florida and the Southern and Middle Districts of Florida and a member of the London Court of International Arbitration and the International Council for Commercial Arbitration, and serves on the AAA and ICDR roster of neutrals, the CPR Institute for Dispute Resolution's "Panel of Distinguished Neutrals," and the National Roster of Environmental Dispute Resolution and Consensus Building Professionals maintained by the U.S. Institute for Environmental Conflict Resolution. He has served or is serving as a neutral in scores of matters involving in the aggregate more than $4 billion. He has conducted or is conducting commercial domestic and international arbitrations under AAA, LCIA, ICDR, UNCITRAL, and CPR rules and has conducted *ad hoc* arbitrations. In November 2003, he was appointed by the presiding judge to serve as the Special Master to oversee the implementation and enforcement of the 1992 Consent Decree between the United States and the State of Florida relating to the restoration of the Florida Everglades. He is a Fellow of the American College of Civil Trial Mediators.

Mr. Barkett also consults with major corporations on the evaluation of legal strategy and risk in commercial disputes, and conducts independent investigations where such services are needed. He also consults with other lawyers on questions of legal ethics.

Mr. Barkett has published two books, *E-Discovery: Twenty Questions and Answers*, (Chicago: First Chair Press, 2008) and *The Ethics of E-Discovery* (Chicago: First Chair Press, 2009). Mr. Barkett has also prepared analyses of the Roberts Court the past six years, in addition to a number of other articles on a variety of topics:

- *Refresher Ethics: Steering Clear of Witness Minefields* (with Green, Bruce; Sandler, Paul Mark) (Professional Education Broadcast Network Webinar, May 16, 2014)
- *Ethics in ADR -- A Sampling of Issues* (Professional Education Broadcast Network Webinar, October 31, 2013)
- *The Roberts Court 2012-13, DOMA, Voting Rights, Affirmative Action, More Consensus, More Dissent*, (ABA Annual Meeting, San Francisco, August 10, 2013)
- *Ethical Challenges on the Horizon: Confidentiality, Competence and Cloud Computing* (ABA-CLE, July 24, 2012; updated, ABA Section of Litigation Annual Conference, Chicago, April 25, 2013)

- *Work Product Protection for Draft Expert Reports and Attorney-Expert Communications* (forthcoming) (ABA Section of Litigation Annual Conference, Chicago, April 26, 2013)
- *Lawyer-Client Fallout: Using Privileged Information To Establish A Claim Against a Client/Employer* (forthcoming) (ABA Section of Litigation Annual Conference, Chicago, April 25, 2013)
- *More on the Ethics of E-Discovery: Predictive Coding and Other Forms of Computer-Assisted Review* (Duke Law School, Washington D.C., April 19, 2013)
- *Evidence Rule 502: The Solution to the Privilege-Protection Puzzle in the Digital Era,* 81 Fordham L. Rev. 1589 (March 2013)
- *Neighborly RCRA Claims*, 27 N.R.E. 48 (Spring 2013)
- *Chess Anyone? Selection of International Commercial Arbitration Tribunals*, (Miami-Dade County Bench and Bar Conference, February 8, 2013)
- *The Roberts Court 2011-12: The Affordable Care Act and More* (ABA Annual Meeting, Chicago, August 3, 2012)
- *Un-taxing E-Discovery Costs: Section 1920(4) After* Race Tire Amer. Inc. *and* Taniguchi (June 29, 2012) (http://www.shb.com/attorneys/BarkettJohn/UntaxingEdiscoveryCosts.pdf)
- Barkett, *ABA to Tackle Technology Issues in Model Rules at August Meeting*, (http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202560335059&thepage=3&slreturn=1). Law Technology News (June 25, 2012)
- *E-Communications: Problems Posed by Privilege, Privacy, and Production* (ABA National Institute on E-Discovery, New York, NY, May 18, 2012)
- *The 7th Circuit Pilot Project: What We Might Learn And Why It Matters to Every Litigant in America* (ABA Section of Litigation News Online, December 11, 2011) http://apps.americanbar.org/litigation/litigationnews/civil_procedure/docs/barkett.december11.pdf
- *Skinner, Matrixx, Souter, and Posner: Iqbal and Twombly Revisited*, 12 The Sedona Conference Journal 69 (2011) (Mr. Barkett received the Burton Award for Legal Achievement for this paper).
- *The Challenge of Electronic Communication, Privilege, Privacy, and Other Myths*, 38 Litigation Journal 17 (ABA Section of Litigation, Fall 2011)
- *Avoiding the Cost of International Commercial Arbitration: Is Mediation the Solution?* in Contemporary Issues in International Arbitration and Mediation – The Fordham Papers (Martinus Nijhoff, New York. 2011)
- *The Roberts Court 2010-11: Three Women Justices!* (ABA Annual Meeting, Toronto, August 2011)
- *The Ethics of Web 2.0,* (ACEDS Conference, Hollywood, FL March 2011)
- *The Roberts Court: Year Four, Welcome Justice Sotomayor* (ABA Annual Meeting, San Francisco, August 2010)
- *The Myth of Culture Clash in International Commercial Arbitration* (co-authored with Jan Paulsson), 5 Florida International University Law Review 1 (June 2010)
- *Walking the Plank, Looking Over Your Shoulder, Fearing Sharks Are in the Water: E-Discovery in Federal Litigation?* (Duke 2010 Conference, Civil Rules Advisory Committee, May 11, 2010) (http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/John%20Barkett,%20Walking%20the%20Plank.pdf)
- *Zubulake Revisited: Pension Committee and the Duty to Preserve, (Feb. 26, 2010) (http://www.abanet.org/litigation/litigationnews/trial_skills/pension-committee-zubulake-ediscovery.html)*
- *Draft Reports and Attorney-Expert Communications*, 24 N.R.E. (Winter 2010)

- *From Canons to Cannon* in A Century of Legal Ethics: Trial Lawyers and the ABA Canons of Professional Ethics (American Bar Association, Chicago, 2009)
- *The Robert's Court: Three's a Charm* (ABA Annual Meeting, Chicago, August 2009)
- *Cheap Talk? Witness Payments and Conferring with Testify Witnesses*, (ABA Annual Meeting, Chicago, 2009)
- *Burlington Northern: The Super Quake and Its Aftershocks*, 58 Chemical Waste Lit. Rprt. 5 (June 2009)
- *Fool's Gold: The Mining of Metadata* (ABA's Third Annual National Institute on E-Discovery, Chicago, May 22, 2009)
- *More on the Ethics of E-Discovery* (ABA's Third Annual National Institute on E-Discovery, Chicago, May 22, 2009)
- *Production of Electronically Stored Information in Arbitration: Sufficiency of the IBA Rules* in Electronic Disclosure in International Arbitration (JurisNet LLC, New York, September 2008)
- *The Robert's Court: The Terrible Two's or Childhood Bliss?* (ABA Annual Meeting, New York, August 2008)
- *Orphan Shares*, 23 NRE 46 (Summer 2008)
- *Tipping The Scales of Justice: The Rise of ADR*, 22 NRE 40 (Spring 2008)
- *Tattletales or Crimestoppers: Disclosure Ethics Under Model Rules 1.6 and 1.13,* (ABA Annual Meeting, Atlanta, August 7, 2004 and, in an updated version, ABA Tort and Insurance Practice Section Spring CLE Meeting, Phoenix, April 11, 2008)
- *E-Discovery For Arbitrators*, 1 Dispute Resolution International Journal 129, International Bar Association (Dec. 2007)
- *The Roberts Court: Where It's Been and Where It's Going* (ABA Annual Meeting, San Francisco, August, 2007)
- *Help Has Arrived…Sort Of: The New E-Discovery Rules*, ABA Section of Litigation Annual Meeting, San Antonio (2007)
- *Refresher Ethics: Conflicts of Interest*, (January 2007 ABA Section of Litigation Joint Environmental, Products Liability, and Mass Torts CLE program)
- *Help Is On The Way…Sort Of: How the Civil Rules Advisory Committee Hopes to Fill the E-Discovery Void*, ABA Section of Litigation Annual Meeting, Los Angeles (2006)
- *The Battle For Bytes: New Rule 26*, e-Discovery, Section of Litigation (February 2006)
- *Forward to the Past: The Aftermath of Aviall*, 20 N.R.E. 27 (Winter 2006)
- *The Prelitigation Duty to Preserve: Lookout!* ABA Annual Meeting, Chicago, (2005)
- *The MJP Maze: Avoiding the Unauthorized Practice of Law* (2005 ABA Section of Litigation Annual Conference)
- *Bytes, Bits and Bucks: Cost-Shifting and Sanctions in E-Discovery*, ABA Section of Litigation Annual Meeting (2004) and 71 Def. Couns. J. 334 (2004)
- *The CERCLA Limitations Puzzle*, 19 N.R.E. 70 (Fall, 2004)
- *If Terror Reigns, Will Torts Follow?* 9 Widener Law Symposium 485 (2003)

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